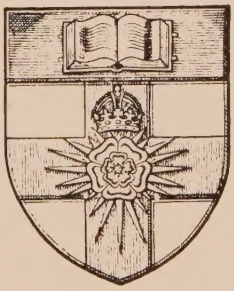
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

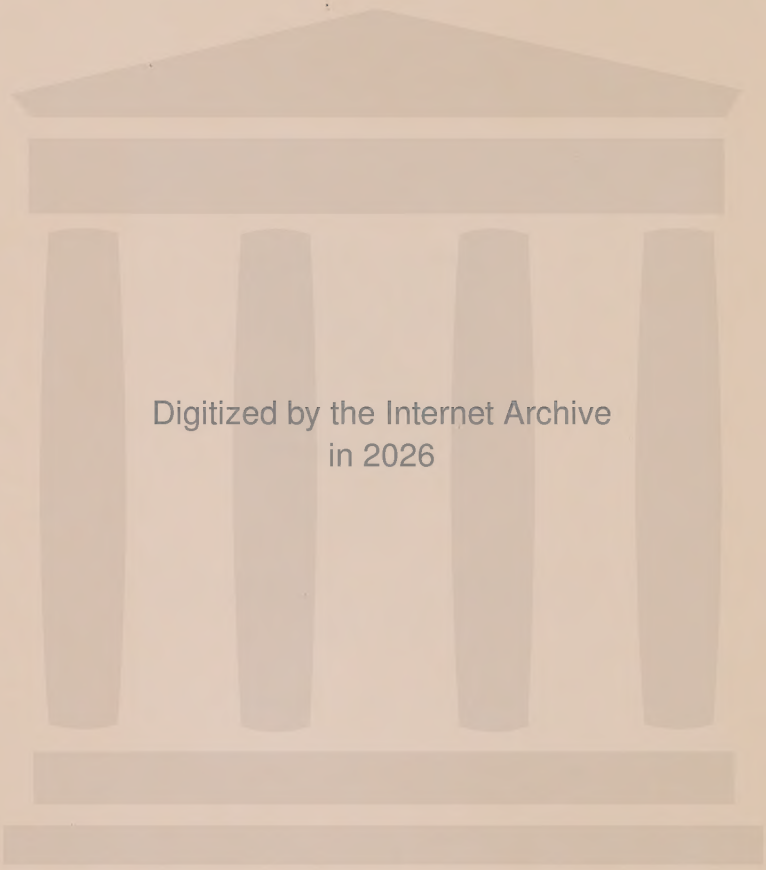
UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North.



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1899_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—MONTAGUE CRACKANTHORPE, Esq., Q.C.
Vice-Chairman—F. A. BOSANQUET, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR RICHARD E. WEBSTER, G.C.M.G., M.P. ATTORNEY-GENERAL.
SIR ROBERT B. FINLAY, Knt., M.P. . . SOLICITOR-GENERAL.
C. B. MARGETTS, Esq., President of the Incorporated Law Society.

ELECTED MEMBERS.

MONTAGUE CRACKANTHORPE, Esq., Q.C. GEORGE FARWELL, Esq., Q.C.	Lincoln's Inn.
F. A. BOSANQUET, Esq., Q.C. M. C. BUSZARD, Esq., Q.C.	Inner Temple.
C. M. WARMINGTON, Esq., Q.C. A. T. LAWRENCE, Esq., Q.C.	Middle Temple.
JAMES MULLIGAN, Esq., Q.C. J. C. LEWIS COWARD, Esq.	Gray's Inn.
W. ENGLISH HARRISON, Esq., Q.C., of the Middle Temple. ROBERT F. NORTON, Esq., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Sons, Coward & Hawksley), 30, Mincing Lane, E.C. E. J. BRISTOW, Esq. (Firm—Messrs. Wilson, Bristows, & Carpmael), 1, Copthall Buildings, E.C.	Incorporated Law Society.

Secretary—PATRICK F. EVANS, Esq., 10 Old Square, Lincoln's Inn.

1899.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS ON

CROWN CASES RESERVED

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal . . .	EDMUND LUMLEY, ALEX. MORTIMER,	*Barristers-at-Law.*
Queen's Bench, Crown Cases Reserved; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases .	WILLIAM APPLETON, W. J. BROOKS, P. B. HUTCHINS, J. F. CLERK, A. P. KEEP,	*Barristers-at-Law.*
Bankruptcy Cases . . .	H. L. FRASER,	*Barrister-at-Law.*

1899.—VOL. I.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED.
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1899.

Earl of HALSBURY, Lord Chancellor.

Lord RUSSELL of Killowen, Lord Chief Justice of England.

Sir NATHANIEL LINDLEY, Master of the Rolls.

Sir FRANCIS HENRY JEUNE, President of the Probate, Divorce, and Admiralty Division.

Sir ARCHIBALD LEVIN SMITH,
Sir JOHN RIGBY,
Sir J. W. CHITTY,
Sir RICHARD HENN COLLINS,
Sir ROLAND VAUGHAN WILLIAMS,
Sir ROBERT ROMER,
} Lords Justices of the Court of Appeal.

JUDGES

OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1899.

The Right Hon. Lord Russell of Killowen, Lord Chief Justice of England, President.
The Hon. Sir Henry Hawkins, Knt. (Lord Brampton).
The Hon. Sir James Charles Mathew, Knt.
The Hon. Sir John Charles Day, Knt.
The Hon. Sir Alfred Wills, Knt.
The Hon. Sir William Grantham, Knt.
The Hon. Sir John Compton Lawrance, Knt.
The Hon. Sir Robert Samuel Wright, Knt.
The Hon. Sir Gainsford Bruce, Knt.
The Hon. Sir William Rann Kennedy, Knt.
The Hon. Sir Edward Ridley, Knt.
The Hon. Sir John Charles Bigham, Knt.
The Hon. Sir Charles John Darling, Knt.
The Hon. Sir Arthur Moseley Channell, Knt.
The Hon. Sir Walter George Frank Phillimore, Bart.
The Hon. Sir Thomas Townsend Bucknill, Knt.

ATTORNEY-GENERAL:

Sir Richard Everard Webster, Knt.

SOLICITOR-GENERAL:

Sir Robert Bannatyne Finlay, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
67	13	*Ludmore*	*Ludford* (see Errata, 13 Q. B. D.)
461	4 (from bottom)		
462	7 (from bottom)		
102	2 (head-note)	s. 26	s. 28.
145	6 (head-note)	*Blakeman*	*Blakemore.*
374	12	William Boycott, Hereford	**F.** & H. Corbett, Worcester.
537	22	suspended	superseded.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1899, will be as follows:—

In the First Series,
[1899] 1 Ch. [1899] 2 Ch.

In the Second Series,
[1899] 1 Q. B. [1899] 2 Q. B. [1899] P.

In the Third Series,
[1899] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Agius *v.* Great Western Colliery Company (C. A.)	413
Alder, Parker *v.*	20
Allen *v.* Fulham Vestry (C. A.)	681
Ashe, Kitson *v.*	425
Ashmore & Co. *v.* Cox & Co.	436
Atlantic Transport Company, Woodham *v.* (C. A.)	15
Attorney-General, Ex parte. In re Higginson & Dean	325
——— *v.* London and North Western Railway Company	72

B.

Barnes *v.* Glenton (C. A.)	885
Baster *v.* London and County Printing Works	901
Baxter *v.* Holdsworth (C. A.)	266
Beall, In re. Ex parte Official Receiver	688
Beardsley *v.* Beardsley	746
Beeston, In re (C. A.)	626
Bennett *v.* Slater (C. A.)	45
Biernstein, Jones *v.*	470
Billings *v.* Holloway (C. A.)	70
Bing, Ex parte. In re Mason	810
Blackmore *v.* White	293
Blythe, Tilling, Limited *v.* (C. A.)	557
Bonner *v.* Tottenham and Edmonton Permanent Investment Building Society (C. A.)	161
Britten *v.* Great Northern Railway Company	243
Broadwood, Shipway *v.* (C. A.)	369
Brock *v.* Harrison	958
Brown *v.* Patch	892
———, Powell *v.* (C. A.)	157
Buckinghamshire County Council and Hertfordshire County Council, In re	515
Burnand, Seaton *v.* (C. A.)	782
Burr, Field Steamship Company *v.* (C. A.)	579
Burrows *v.* Rhodes	816
Butler, Linforth *v.*	116

C.

PAGE

Cahn *v.* Pockett's Bristol Channel Steam Packet Company (C. A.) 643
Carlton Bank, Cornford *v.* 392
Cartwright *v.* Sculcoates Union (C. A.) 667
City of London Brewery Company *v.* Inland Revenue Commissioners (C. A.) 121
Clare, Hunter *v.* 635
Clark, Hasluck *v.* (C. A.) 699
Comptroller-General of Patents, Designs, and Trademarks, Reg. *v.* (C. A.) 909
Cook, In re. Ex parte Cripps 863
Cornford *v.* Carlton Bank 392
Coste, Wohlgemuthe *v.* 501
Coughlin *v.* Gillison (C. A.) 145
Coulson, Cunard Steam Ship Company *v.* 865
Cox, Hall *v.* (C. A.) 198
Cox & Co., Ashmore & Co. *v.* 436
Cree *v.* St. Pancras Vestry 693
Cripps, Ex parte. In re Cook 863
Crisp *v.* London County Council 720
Cunard Steam Ship Company *v.* Coulson 865

D.

Dalton Overseers, North Eastern Railway Company *v.* (C. A.) 1026
Davison, Norton *v.* (C. A.) 401
Dawson & Son, McNicholas *v.* (C. A.) 773
Dent, Eastern Telegraph Company *v.* (C. A.) 835
Dixon, London County Council *v.* 496
Duncan, Morris *v.* 4

E.

PAGE

Eastern Telegraph Company *v.* Dent (C. A.) 835
Eaton *v.* Tapley 953
Eckersley, Newby *v.* (C. A.) 465
Edwards *v.* Purnell 449
Ellis, Reg. *v.* (C. C. R.) 230
—— *v.* Wadeson (C. A.) 714
Entwistle, Reg. *v.* Ex parte Jones 846

F.

Field Steamship Company *v.* Burr (C. A.) 579
Foot, Greater London Property Company *v.* 972
Francis, Greenwood *v.* (C. A.) 312
Fulham Vestry, Allen *v.* (C. A.) 681

G.

Gamble, In re 305
Gardner, Reg. *v.* (C. C. R.) 150
George and Goldsmiths and General Burglary Insurance Association, In re (C. A.) 595
Gieve, In re (C. A.) 794
Gillison, Coughlin *v.* (C. A.) 145
Girvin & Co., Weir & Co. *v.* 193
Glenton, Barnes *v.* (C. A.) 885
Goldsmiths and General Burglary Insurance Association and George, In re (C. A.) 595
Graham, Starey *v.* 406
Grant, Moxham *v.* 480
Great Eastern Railway Company, Mallet *v.* 309
Great Northern Railway Company, Britten *v.* 243
Great Western Colliery Company, Agius *v.* (C.A .) 413

PAGE

Greater London Property Company *v.* Foot 972
Greenwood *v.* Francis (C. A.) 312

H.

Hale, Jarman *v.* 994
Hall *v.* Cox (C. A.) 198
—— *v.* Snowdon, Hubbard & Co. (C. A.) 593
Halliwell, River Ribble Joint Committee *v.* 27
Hampton Urban Council, Southwark and Vauxhall Water Company *v.* (C. A.) 273
Handford (Frances) & Co., In re. Ex parte Frances Handford (C. A.) 566
Harford *v.* Linskey 852
Harrison, Brock *v.* 958
Haslingden Union and Rochdale Union, In re (C. A.) 540
Hasluck *v.* Clark (C. A.) 699
Headland's Patent Electric Storage Battery Company, White *v.* (C. A.) 507
Heath, Seaton *v.* (C. A.) 782
Hertfordshire County Council and Buckinghamshire County Council, In re 515
Higginson & Dean, In re. Ex parte Attorney-General 325
Hirth (Carl), In re. Ex parte The Trustee (C. A.) 612
Hoddinott *v.* Newton, Chambers & Co. (C. A.) 1018
Hodson *v.* Pare (C. A.) 455
Holdsworth, Baxter *v.* (C. A.) 266
Holliday *v.* National Telephone Company 221
Holloway, Billings *v.* (C. A.) 70
Hubbuck & Sons, Limited *v.* Wilkinson, Heywood & Clark, Limited (C. A.) 86
Hunter *v.* Clare 635

I.

PAGE

Ibbotson, Lowth *v.* (C. A.) 1003
Inland Revenue Commissioners, City of London Brewery Company *v.* (C. A.) 121

Knights Deep, Limited *v.* 345

Lancashire Insurance Company *v.* 353

National Telephone Company *v.* (C. A.) 250

Swayne *v.* 335

United Realization Co. *v.* 361

Vulcan Boiler and General Insurance Co. *v.* 353

J.

Jarman *v.* Hale 994
Johnson, Kitchen *v.* 95
Jones, Ex parte. Reg. *v.* Entwistle 846
—— *v.* Biernstein 470
—— *v.* Munro 109

K.

King, Yabbicom *v.* 444
Kitchen *v.* Johnson 95
Kitson *v.* Ashe 425
Knights Deep, Limited *v.* Inland Revenue Commissioners 345

L.

Lancashire and Yorkshire Railway Company, Smith *v.* (C. A.) 141

	PAGE
Lancashire Asylums Board *v.* Manchester Corporation	759
Lancashire Insurance Company *v.* Inland Revenue Commissioners	353
Larsen, Ritchie *v.*	727
Lawrence, Mather *v.*	1000
Lee, Prescott *v.*	102
Linforth *v.* Butler	116
Linskey, Harford *v.*	852
Lloyd and Tooth, In re (C. A.)	559
London and County Printing Works, Baster *v.*	901
London and North Western Railway Company, Attorney-General *v.*	72
Reg. *v.* (C. A.)	921
London County Council, Crisp *v.*	720
v. Dixon	496
Thompson *v.* (C. A.)	840
London Justices, Reg. *v.*	532
Lowden, Pease *v.*	386
Lowe *v.* Pearson (C. A.)	261
Lower Rhine and Würtemberg Insurance Association *v.* Sedgwick (C. A.)	179
Lowndes, Reg. *v.*	577
Lowth *v.* Ibbotson (C. A.)	1003
Lynes *v.* Snaith	486

M.

	PAGE
McNicholas *v.* Dawson & Son (C. A.)	773
Mallet *v.* Great Eastern Railway Company	309
Manchester Corporation, Lancashire Asylums Board *v.*	759
Manchester Justices, Reg. *v.*	571
Marney *v.* Scott	986
Marsden & Sons, Price *v.* (C. A.)	493
Marshall, Parkes & Co., Powell *v.* (C. A.)	710
Mason, In re. Ex parte Bing	810
Mather *v.* Lawrence	1000
Mellor *v.* Tomkinson & Co. (C. A.)	374
Mersey Docks and Harbour Board, Ex parte (C. A.)	546
Middlesex (Sheriff of), Ex parte. In re Thomas	66
(C. A.)	460
Miller, Rowlands *v.*	735
Morris *v.* Duncan	4
Mountain *v.* Parr (C. A.)	805
Moxham *v.* Grant	480
Munro, Jones *v.*	109

N.

	PAGE
National Telephone Company, Holliday *v.*	221
v. Inland Revenue Commissioners (C. A.)	250
New Zealand Shipping Company, Waikato (Owners of Cargo on board SS.) *v.* (C. A.)	56
Newby *v.* Eckersley (C. A.)	465
Newton, Chambers & Co., Hoddinott *v.* (C. A.)	1018
Norris, Williamson *v.*	7
North Eastern Railway Company *v.* Dalton Overseers (C. A.)	1026
North Riding of Yorkshire County Council, Reg. *v.*	201
Norton *v.* Davison (C. A.)	401

O.

	PAGE
Official Receiver, Ex parte. In re Beall	688

PAGE

Official Receiver, Ex parte. In re Raynes Park Golf Club 961
Ogilvy, West Lancashire Rural Council *v.* 377

P.

Pare, Hodson *v.* (C. A.) 455
Parker *v.* Alder 20
Parr, Mountain *v.* (C. A.) 805
Patch, Brown *v.* 892
Pearson, Lowe *v.* (C. A.) 261
Pease *v.* Lowden 386
Petts, Watson *v.* (C. A.) 54
——— *v.* (No. 2) 430
Pockett's Bristol Channel Steam Packet Company, Cahn *v.* (C. A.) 643
Powell *v.* Brown (C. A.) 157
——— *v.* Marshall, Parkes & Co. (C. A.) 710
———, Reg. *v.* Ex parte Williams 396
Prescott *v.* Lee 102
Pretty, Wandsworth Board of Works *v.* 1
Price *v.* Marsden & Sons (C. A.) 493
Purnell, Edwards *v.* 449
Purves *v.* Straits of Dover Steamship Company 38

R.

Raynes Park Golf Club, In re. Ex parte Official Receiver 961
Rees *v.* Thomas (C. A.) 1015
Reg. *v.* Comptroller-General of Patents, Designs, and Trade Marks (C. A.) 909
—— *v.* Ellis (C. C. R.) 230
—— *v.* Entwistle. Ex parte Jones 846

PAGE

Reg. *v.* Gardner (C. C. R.) 150
—— *v.* London and North Western Railway Company (C. A.) 921
—— *v.* London Justices 532
—— *v.* Lowndes 577
—— *v.* Manchester Justices 571
—— *v.* North Riding of Yorkshire County Council 201
—— *v.* Powell. Ex parte Williams 396
—— *v.* Rhodes (C. C. R.) 77
—— *v.* Saunders (C. C. R.) 490
—— *v.* Senior (C. C. R.) 283
—— *v.* Stewart 964
—— *v.* Warwickshire Justices (C. A.) 59
—— *v.* Worcestershire Justices (C. A.) 59
Rhoades, In re. Ex parte Rhoades 905
Rhodes, Burrows *v.* 816
———, Reg. *v.* (C. C. R.) 77
Ritchie *v.* Larsen 727
River Ribble Joint Committee *v.* Halliwell 27
——— *v.* Shorrock 27
Robinson *v.* Sunderland Corporation 751
Rochdale Union and Haslingden Union, In re (C. A.) 540
Rowlands *v.* Miller 735
Royal College of Surgeons of England, In re (C. A.) 871
Rutson, Wix *v.* 474

S.

St. Pancras Vestry, Cree *v.* 693
Saunders, Reg. *v.* (C. C. R.) 490
Scott, Marney *v.* 986
Sculcoates Union, Cartwright *v.* (C. A.) 667
Seaton *v.* Heath. Seaton *v.* Burnand (C. A.) 782

	PAGE
Sedgwick, Lower Rhine and Würtemberg Insurance Association *v.* (C. A.)	179
Senior, Reg. *v.* (C. C. R.)	283
Shipway *v.* Broadwood (C. A.)	369
Shorrock, River Ribble Joint Committee *v.*	27
Simmons *v.* White Brothers (C. A.)	1005
Slater, Bennett *v.* (C. A.)	45
Smith *v.* Lancashire and Yorkshire Railway Company (C. A.)	141
Snaith, Lynes *v.*	486
Snowdon, Hubbard & Co., Hall *v.* (C. A.)	593
Southwark and Vauxhall Water Company *v.* Hampton Urban Council (C. A.)	273
Sowerby Urban Council, Sykes *v.*	979
Starey *v.* Graham	406
Stewart, Reg. *v.*	964
Straits of Dover Steamship Company, Purves *v.*	38
Strickland *v.* Williams (C. A.)	382
Sunderland Corporation, Robinson *v.*	751
Swayne *v.* Inland Revenue Commissioners	335
Sykes *v.* Sowerby Urban Council	979

T.

Tapley, Eaton *v.*	953
Thomas, In re. Ex parte Sheriff of Middlesex	66
——— (C. A.)	460
———, Rees *v.* (C. A.)	1015
Thompson *v.* London County Council (C. A.)	840
Tilling, Limited *v.* Blythe (C. A.)	557
Tomkinson & Co., Mellor *v.* (C. A.)	374
Tottenham and Edmonton Permanent Investment Building Society, Bonner *v.* (C. A.)	161

U.

United Realization Co. *v.* Inland Revenue Commissioners	361

V.

Vulcan Boiler and General Insurance Co. *v.* Inland Revenue Commissioners	353

W.

Wadeson, Ellis *v.* (C. A.)	714
Waikato (Owners of Cargo on board SS.) *v.* New Zealand Shipping Company (C. A.)	56
Walsh & Sons, Wood *v.* (C. A.)	1009
Wandsworth Board of Works *v.* Pretty	1
Warwickshire Justices, Reg. *v.* (C. A.)	59
Watson *v.* Petts (C. A.)	54
——— *v.* ——— (No. 2)	430
Weir & Co. *v.* Girvin & Co.	193
West Lancashire Rural Council *v.* Ogilvy	377
White, Blackmore *v.*	293
——— *v.* Headland's Patent Electric Storage Battery Company (C. A.)	507
White Brothers, Simmons *v.* (C. A.)	1005
Wilkinson, Heywood & Clark, Limited, Hubbuck & Sons, Limited *v.* (C. A.)	86

	PAGE
Williams, Ex parte. Reg. *v.* Powell	396
———, Strickland *v.* (C. A.)	382
Williamson *v.* Norris	7
Wix *v.* Rutson	474
Wohlgemuthe *v.* Coste	501
Wood *v.* Walsh & Sons (C. A.)	1009
Woodham *v.* Atlantic Transport Company (C. A.)	15
Worcestershire Justices, Reg. *v.* (C. A.)	59

Y.

Yabbicom *v.* King	444

TABLE OF CASES CITED.

A.

		PAGE
Abouloff *v.* Oppenheimer	10 Q. B. D. 295	748
Abrath *v.* North Eastern Railway Company	11 App. Cas. 247	392
Acton Local Board *v.* Batten	28 Ch. D. 283	980
Adams *v.* Bostock	8 Q. B. D. 259	104
Adamson *v.* Jarvis	4 Bing. 66	820
Aitken, Lilburn & Co. *v.* Ernsthausen & Co.	[1894] 1 Q. B. 773	195
Alchin *v.* Wells	5 T. R. 470	461
Alexandra Palace Company, In re	21 Ch. D. 149	481
Allen *v.* Flood	[1898] A. C. 1	92
Alliance Deposit and Investment Company *v.* Gardiner	105 L. T. Journ. 224	568
Allison *v.* Bristol Marine Insurance Company	1 App. Cas. 209	195
Allum *v.* Dickinson	9 Q. B. D. 632	477
Anderson, Ex parte	L. R. 5 Ch. 473	327
Andrew *v.* St. Olave's Board of Works	[1898] 1 Q. B. 775	695
Andrews *v.* Barnes	39 Ch. D. 133	698
——— *v.* Styrap	26 L. T. 704	638
Arnold *v.* Clifford	2 Sumner's Circuit Court Rep. U. S. 238	828
Ashby *v.* Costin	21 Q. B. D. 401	48
Ashley *v.* Ashley	4 Ch. D. 757	327
Attenborough *v.* St. Katherine's Dock Company	3 C. P. D. 450	546
Attorney-General *v.* Cockermouth Local Board	L. R. 18 Eq. 172	72
——— *v.* Great Western Railway Company	L. R. 7 Ch. 767	72
——— *v.* Hooper	[1893] 3 Ch. 483	754
——— *v.* Royal College of Physicians	1 J. & H. 561	638
——— *v.* Shrewsbury (Kingsland) Bridge Company	21 Ch. D. 752	72
——— *v.* Worrall	[1895] 1 Q. B. 99	364
Austin *v.* Bethnal Green Union	L. R. 9 C. P. 91	398

B.

Bagshawes, *v.* Deacon	[1898] 2 Q. B. 173	471
Bailey *v.* Watson & Co	[1898] 2 Q. B. 270	507
Baines *v.* Swainson	4 B. & S. 270	659

		PAGE
Baker *v.* Bank of Australasia	1 C. B. (N.S.) 515	547
Bank of New South Wales *v.* Owston	4 App. Cas. 270	395
Bannister *v.* Hyde	2 E. & E. 627	472
Barclay *v.* Pearson	[1893] 2 Ch. 154	200
——— *v.* Russell	3 Ves. 424	327
Barker *v.* St. Quintin	12 M. & W. 441	629
——— *v.* Smark	7 M. & W. 590	349
Barrow *v.* Isaacs	[1891] 1 Q. B. 417	835
Barrs *v.* Jackson	1 Y. & C. Ch. 585	748
Batchelor *v.* Bigger	60 L. T. 416	477
Bateman *v.* Poplar District Board of Works	33 Ch. D. 360	975
Bates *v.* Donaldson	[1896] 2 Q. B. 241	836
Baxendale *v.* London, Chatham and Dover Railway Company	L. R. 10 Ex. 35	414
Baxter *v.* Bedford Corporation	1 Times L. R. 424	447
Baylis *v.* Jiggens	[1898] 2 Q. B. 315	477
Bendle *v.* Watson	L. R. 7 C. P. 163	97
Bennetts *v.* McIlwraith	[1896] 2 Q. B. 464	841
Best *v.* Hayes	1 H. & C. 718	556
Bethnal Green Vestry *v.* London School Board	[1898] A. C. 190	974
Betts *v.* Gibbins	2 A. & E. 57	829
Biddle *v.* Bond	6 B. & S. 225	550
Blakemore *v.* Bristol and Exeter Railway Company	8 E. & B. 1035; 27 L. J. (Q.B.) 167	145, 146
Blankley *v.* Winstanley	3 T. R. 279	61
Blogg *v.* Pinkers	Ry. & M. 125	638
Bogle *v.* Sherborne Local Board	46 J. P. 675	754
Bollen *v.* Southall	15 Q. B. D. 461	109
Bonella *v.* Twickenham Local Board	18 Q. B. D. 577; 20 Q. B. D. 63	980, 982
Bonzi *v.* Stewart	4 M. & G. 295	648
Borrowman *v.* Free	48 L. J. (Q.B.) 65	370
Boulter *v.* Kent Justices	[1897] A. C. 556	61, 276, 575
Bows *v.* Fenwick	L. R. 9 C. P. 339	894
Bradburn *v.* Great Western Railway Company	L. R. 10 Ex. 1	356
Bradford-on-Avon Assessment Committee *v.* White	[1898] 2 Q. B. 630	672
Bradlaugh *v.* Gossett	12 Q. B. D. 271	10
Brall, In re	[1893] 2 Q. B. 381	619
Brett *v.* Rogers	[1897] 1 Q. B. 525	477
Bristol Case	Simeon on Elections, p. 47	856
British Empire Type Setting Company *v.* Linotype Company	79 L. T. 8	89
British India Steam Navigation Company *v.* Inland Revenue Commissioners	7 Q. B. D. 165	131
Broad *v.* Perkins	21 Q. B. D. 533	432
Brocklehurst *v.* Jessop	7 Sim. 438	886
Brown *v.* Foot	66 L. T. 649	23
Bruty *v.* Grand Trunk Railway Company of Canada	32 Canada Q. B. Rep. 66	247
Burdick *v.* Sewell	13 Q. B. D. 159	650
Burford *v.* Unwin	1 Cab. & E. 494	836
Burge *v.* Brutton	2 Hare, 373	906
Burgess *v.* Wheate	1 Eden, 177	327
Burnett *v.* Berry	[1896] 1 Q. B. 641	428

		PAGE
Burnley Steamship Company *v.* Aiken	31 S. L. R. 803	869
Butcher *v.* Stead	L. R. 7 H. L. 839	619

C.

Caledonian Railway Company *v.* Inland Revenue Commissioners	18 S. L. R. 85	869
——— *v.* Mulholland	[1898] A. C. 216	988
Callo *v.* Brouncker	4 C. & P. 518	902
Caminada *v.* Hulton	60 L. J. (M.C.) 116	200
Campbell *v.* Campbell	7 Cl. & F. 166	821
Canning *v.* Raper	1 E. & B. 164	130
Cardiff Boarding Masters' Association *v.* Cory & Sons	9 Times L. R. 388	743
Carey, In re	[1895] 2 Q. B. 624	615
Carter and Kenderdine's Contract, In re	[1897] 1 Ch. 776	619
——— *v.* Boehm	3 Burr. 1905	790
Chamber Colliery Company *v.* Rochdale Canal Company	[1895] A. C. 564	925
Chandos (Marquis) *v.* Inland Revenue Commissioners	6 Ex. 464	339
Chaplin, Ex parte	26 Ch. D. 319	616
Child *v.* Stenning	5 Ch. D. 695	841
Chissum *v.* Dewes	5 Russ. 29	908
Christie *v.* Inland Revenue Commissioners	L. R. 2 Ex. 46	339
City of London Brewery Company *v.* Inland Revenue Commissioners	[1898] 1 Q. B. 408	364
Clarke *v.* Birley	41 Ch. D. 422	317
Clifford *v.* Inland Revenue Commissioners	[1896] 2 Q. B. 187	255
——— *v.* Watts	L. R. 5 C. P. 577	439
Clyde Cycle Company *v.* Hargreaves	78 L. T. 296	246
Cohen *v.* Mitchell	25 Q. B. D. 262	690
Colburn *v.* Patmore	1 C. M. & R. 73; 4 Tyrw. 677	820, 832
Colchester Corporation *v.* Seaber	3 Burr. 1866	331
Cole *v.* North Western Bank	L. R. 10 C. P. 354	659
College of Physicians *v.* Rose	3 Salk. 17; 6 Mod. 44	638
Colne Valley Water Company *v.* Treharne	50 L. T. 617	380
Colquhoun *v.* Brooks	21 Q. B. D. 52	356
Cook *v.* Gordon	61 L. J. (Q.B.) 445	503
Cooper *v.* Wandsworth Board of Works	14 C. B. (N.S.) 180	753
Coster, In re	7 Morr. 284	690
Cotsworth *v.* Betison	1 Ld. Raym. 104	471
Coxon *v.* Gorst	[1891] 2 Ch. 73	327
Cradock *v.* Owen	2 Sm. & G. 241	329
——— *v.* Scottish Provident Institution	63 L. J. (Ch.) 15	364
Crawshay *v.* Thornton	2 My. & Cr. 1	549
Crescent, The Ship	62 L. J. (P. D. & A.) 63	503
Crouch *v.* Tregonning	L. R. 7 Ex. 88	164
Croysdale *v.* Sunbury-on-Thames Urban Council	[1898] 2 Ch. 515	980
Cundy *v.* Lecocq	13 Q. B. D. 207	831
Cunnack *v.* Edwards	[1896] 2 Ch. 679	327

D.

		PAGE
Dalby *v.* East India Insurance Company	15 C. B. 365	356
Dalglish *v.* Jarvie	2 Mac. & G. 231	790
Dalton *v.* Angus	6 App. Cas. 740	224
——— *v.* Midland Railway Company	12 C. B. 458	547
Dane *v.* Mortgage Insurance Corporation	[1894] 1 Q. B. 54	785
Darrell *v.* Tibbitts	5 Q. B. D. 560	356
David Lloyd & Co., In re	6 Ch. D. 339	615
Davies *v.* London and Provincial Marine Insurance Company	8 Ch. D. 469	786
——— *v.* Makuna	29 Ch. D. 596	638, 876
Dawson *v.* Linton	5 B. & A. 521	164
Day *v.* Day	L. R. 3 P. C. 751	996
D'Epineuil, In re	20 Ch. D. 217	707
Deerhurst, In re	8 Morr. 258	909
Deering *v.* Winchelsea	2 B. & P. 270	164, 318
D'Errico *v.* Samuel	[1896] 1 Q. B. 163	508
Dench *v.* Bampton	4 Ves. 700	295
De Vaux *v.* Salvador	4 A. & E. 420	589
Dighton *v.* Withers	31 Beav. 423	364
Dillon *v.* Cunningham	L. R. 8 Ex. 23	568
Diss Urban Sanitary Authority *v.* Aldrich	2 Q. B. D. 178	753
Dixon *v.* Fawcus	30 L. J. (Q.B.) 137	829
Dodds *v.* South Shields Union	[1895] 2 Q. B. 133	667
Doe *v.* Carter	9 Q. B. 863	997
—— *v.* Thomas	6 Ex. 854	996
—— *v.* Turner	7 M. & W. 226; 9 M. & W. 643	487
Domvile *v.* Domvile	4 Sw. & Tr. 17; 34 L. J. (P. & M.) 79	748
Downes, Ex parte	18 Ves. 290	909
Duke of Buccleugh, The	[1892] P. 201	488
Durrant *v.* Branksome Urban Council	[1897] 2 Ch. 291	980
Dyke *v.* Walford	5 Moo. P. C. 434	327
Dymond *v.* Croft	3 Ch. D. 512	558

E.

East London Waterworks *v.* Leyton Sewer Authority	L. R. 6 Q. B. 669	279
Eastcourt *v.* Weekes	1 Salk. 186	298
Eden *v.* Poole	Park Ins. 117	589
Edmunds *v.* Brown	1 Lev. 237	327
——— *v.* Wallingford	14 Q. B. D. 811	164
Edwards *v.* Levy	2 F. & F. 94	902
——— *v.* Midland Railway Company	6 Q. B. D. 287; 50 L. J. (Q.B.) 281	392, 394
——— *v.* Steel	[1897] 1 Q. B. 712; 2 Q. B. 327	38
Elliot *v.* North Eastern Railway Company	32 L. J. (Ch.) 402; 10 H. L. C. 333	924
Ellis *v.* Kelly	6 H. & N. 222; 30 L. J. (M.C.) 35	636
Elphinstone (Lord) *v.* Monkland Iron and Coal Company	11 App. Cas. 332	383

		PAGE
Emberley *v.* Trevanion	4 Sw. & Tr. 197; 29 L. J. (P. & M.) 142	748
Engelhart *v.* Farrant & Co.	[1897] 1 Q. B. 240	263, 1016
England *v.* Marsden	L. R. 1 C. P. 529	164
Errington *v.* Metropolitan District Railway Company	19 Ch. D. 559	925
Evans *v.* Harlow	5 Q. B. 624	88
——— *v.* Noton	[1893] 1 Ch. 252	558
Everet *v.* Williams	2 Pothier on Obligations, p. 3, n.	826
Exall *v.* Partridge	8 T. R. 308	164

F.

Farebrother *v.* Ansley	1 Camp. 343	828
Farquharson *v.* Morgan	[1894] 1 Q. B. 552	432, 562
Farr *v.* Ward	2 M. & W. 844	550
Ferrand *v.* Hallas Land and Building Company	[1893] 2 Q. B. 135	980
Fillieul *v.* Armstrong	7 Ad. & E. 557	902
Finch, In re	8 Morr. 284	627
Finlay *v.* Mexican Investment Corporation	[1897] 1 Q. B. 517	790
Firth *v.* Purvis	5 T. R. 432	471
——— *v.* Slingsby	58 L. T. 481	886
Fisher *v.* Val de Travers Asphalte Company	1 C. P. D. 511	417
Fleet *v.* Murton	L. R. 7 Q. B. 126	845
Fletcher *v.* Harcot	Hutton, 55	829
——— *v.* Poole	Park Ins. 115	589
Flitcroft's Case	21 Ch. D. 519	482
Florence *v.* Paddington Vestry	12 Times L. R. 30	974
Forder *v.* Handyside	1 Ex. D. 233.	867
Fort, In re	[1897] 2 Q. B. 495	814
Foskett *v.* Kaufman	16 Q. B. D. 279	97
Francis *v.* Cockrell	L. R. 5 Q. B. 501	987
Fraser *v.* Mason	11 Q. B. D. 574	302
Frisby, In re	43 Ch. D. 106	886

G.

Gallaway *v.* Maries	8 Q. B. D. 275	895
Gaunt *v.* Wainman	3 Bing. N. C. 69	748
Gebhardt *v.* Saunders	[1892] 2 Q. B. 452	695
Geen *v.* Newington Vestry	[1898] 2 Q. B. 1	974
General Exchange Bank, In re	L. R. 4 Eq. 138	690
Gerrard *v.* Clowes	[1892] 2 Q. B. 11	383
Gibson *v.* Wells	1 B. & P. (N. R.) 290	297
Glossop's Patent	Griffin's Pat. Cas. 285	913
Gould, In re	19 Q. B. D. 92	700
Gower *v.* Couldridge	[1898] 1 Q. B. 348	841
Gozzett *v.* Maldon Urban Sanitary Authority	[1894] 1 Q. B. 327	498
Graff *v.* Evans	8 Q. B. D. 373	10
Grason, In re	12 Ch. D. 366	813
Great Northern Railway *v.* Shepherd	8 Ex. 30	247
Great Western Railway Company *v.* Cefn Cribbwr Brick Company	[1894] 2 Ch. 157	925

		PAGE
Grébert-Borgnis *v.* Nugent	15 Q. B. D. 85	417
Gurney *v.* Behrend	3 E. & B. 622	650
Gwinnell *v.* Eamer	L. R. 10 C. P. 658	988

H.

Hadley *v.* Baxendale	9 Ex. 341	413
Hamilton *v.* Watson	12 Cl. & F. 109	785
Hammond & Co. *v.* Bussey	20 Q. B. D. 79	414
Hampton *v.* Holman	5 Ch. D. 183	690
Hanbridge *v.* Beveridge	1 Lawson's Registration Cases (Irish), 303	97
Hardaker *v.* Idle District Council	[1896] 1 Q. B. 335	224
Hargreaves *v.* Taylor	3 B. & S. 613	754
Harper *v.* Carr	7 T. R. 270	534
Harrington *v.* Victoria Graving Dock Company	3 Q. B. D. 549	370
Harrison, In re	[1893] 2 Q. B. 111	67, 461
——, In re	32 Ch. D. 395	906
Hart *v.* Alexander	36 S. L. R. 64	965
Hawke *v.* Dunn	[1897] 1 Q. B. 579	895
Hayward *v.* Row	6 H. & N. 308	302
Heath & Frost's Patent	Griffin's Pat. Cas. 288	913
—— *v.* Pugh	6 Q. B. D. 345; 7 App. Cas. 235	364
—— *v.* Weaverham Overseers	[1894] 2 Q. B. 108	1030
Heaven *v.* Pender	11 Q. B. D. 503	988
Heinemann & Co. *v.* Hale & Co.	[1891] 2 Q. B. 83	715
Henderson *v.* Midland Railway Company	24 L. T. 881	393
Henderson & Co. *v.* Williams	[1895] 1 Q. B. 521	547
Hepworth *v.* Hill	30 Beav. 476	364
Herne *v.* Bembow	4 Taunt. 764.	300
Holland *v.* Chambers	3 Lawson's Registration Cases (Irish), 40.	97
—— *v.* Lazarus	66 L. J. (Q.B.) 285	974
Holman *v.* Johnson	1 Cowp. 341	819
Holme *v.* Brunskill	3 Q. B. D. 495	318
Holmes and Formby, In re	[1895] 1 Q. B. 174	561
—— *v.* Newcastle-upon-Tyne Freehold Abattoir Company	1 Ch. D. 682.	482
—— *v.* North Eastern Railway Company	L. R. 4 Ex. 254; 6 Ex. 123	988
Holthausen, Ex parte. In re Scheibler.	L. R. 9 Ch. 722	711
Honduras Railway Company *v.* Tucker	2 Ex. D. 301.	841
Hookham's Patent	Griffin's Additional Pat. Cas. 32	913
Hough *v.* Windus	12 Q. B. D. 224	408
Howarth *v.* Brearley	19 Q. B. D. 303	876
Howell *v.* Coupland	1 Q. B. D. 258	438
Howes *v.* Turner	1 C. P. D. 670	859
Hubback, In re	29 Ch. D. 934	907
Hubbuck & Sons *v.* Wilkinson, Heywood & Clark	[1899] 1 Q. B. 86	457
Hudston *v.* Midland Railway	L. R. 4 Q. B. 366	247
Humphrey *v.* Earle	20 Q. B. D. 294	104
Hunt *v.* Tripp	[1898] 1 Ch. 675	690
Hunter *v.* Hunt	1 C. B. 300	174
Hurcum *v.* Hilleary	[1894] 1 Q. B. 579	97

		PAGE
Hurley, In re	10 Morr. 120.	626
Hurley's Estate, In re	1 L. R. Ir. 488	364
Hyde *v.* Warden	3 Ex. D. 72	835

I.

Indermaur *v.* Dames	L. R. 1 C. P. 274	987
Inland Revenue Commissioners *v.* City of Glasgow Bank	8 R. 389	339
——— *v.* Forrest	15 App. Cas. 334	874
——— *v.* Scott	[1892] 2 Q. B. 152	876
Institute of Patent Agents *v.* Lockwood	[1894] A. C. 347	407
Isis, The	8 P. D. 227	955
Izard, Ex parte	L. R. 9 Ch. 271	363

J.

Jackson *v.* Litchfield	8 Q. B. D. 474	716
James, Ex parte	L. R. 9 Ch. 609	906
Jones *v.* Inland Revenue Commissioners	[1895] 1 Q. B. 484	250, 349

K.

Keeble *v.* Bennett	[1894] 2 Q. B. 329	507
Kelner *v.* Baxter	L. R. 2 C. P. 174	845
Kemp *v.* Christmas	79 L. T. 233	471
——— *v.* Courage & Co.	7 Times L. R. 50; 55 J. P. 264	393
Kerr *v.* Preston Corporation	6 Ch. D. 463	447
Kershaw *v.* Taylor	[1895] 2 Q. B. 471	974
Kirk *v.* Purchase	32 L. R. Ir. 359	628
Knowles *v.* Lancashire and Yorkshire Railway Company	14 App. Cas. 248	925
——— *v.* Sinclair	[1898] 1 Q. B. 170	453
Kruse *v.* Johnson	[1898] 2 Q. B. 91	428

L.

Lacey, Ex parte	6 Ves. 625	327
Lampleigh *v.* Brathwait	1 Sm. L. C. 9th ed. p. 160	167
Laskier *v.* Tekeian	67 L. T. 121	266
Law *v.* Redditch Local Board	[1892] 1 Q. B. 127	384
Lawford *v.* Partridge	26 L. J. (Ex.) 147	432
Lee *v.* Dangar	[1892] 1 Q. B. 231; 2 Q. B. 337	461
—— *v.* Jones	17 C. B. (N.S.) 482	786
—— *v.* Neilson	23 Rettie, 77; 2 Adam, 145	847
Leigh *v.* Dickeson	15 Q. B. D. 60	175
Leith Harbour and Docks Commissioners *v.* Inspector of the Poor	L. R. 1 H. L., Sc. 17	10
Lester & Co., Ex parte	[1893] 2 Q. B. 113	567
Levene, Ex parte	[1895] 1 Q. B. 328	567
Levy *v.* Abercorris Slate and Slab Company	37 Ch. D. 260	131, 256
—— *v.* Champneys	4 Ad. & E. 365	628

		PAGE
Lewis *v.* Campbell	8 C. B. 541	176
—— *v.* Great Western Railway Company	3 Q. B. D. 195	311
—— *v.* Weston-Super-Mare Local Board	40 Ch. D. 55	757
Lickbarrow *v.* Mason	2 T. R. 63; 1 H. Bl. 357; 6 East, 20	647
Liddell *v.* Lofthouse	[1896] 1 Q. B. 295	894
Lilley *v.* Roney	61 L. J. (Q.B.) 727	456
Limmer Asphalte Paving Company *v.* Inland Revenue Commissioners	L. R. 7 Ex. 211	255
Lindenau *v.* Desborough	8 B. & C. 586	785
Linen and Woollen Drapers' Institution	58 L. T. 949	876
Linforth *v.* Butler	[1899] 1 Q. B. 116	107
Lister *v.* Smith	3 Sw. & Tr. 53; 32 L. J. (P. & M.) 13	748
Lithgow, Ex parte	10 Ch. D. 169	629
Locke *v.* Matthews	13 C. B. (N.S.) 753	997
—— *v.* White	33 Ch. D. 308	267
London and Blackwall Railway Company *v.* Cross	31 Ch. D. 354	925
London and Caledonian Marine Insurance Company, In re	11 Ch. D. 140	327
London Assurance *v.* Mansel	11 Ch. D. 363	785
London Corporation *v.* Cox	L. R. 2 H. L. 239	432
London County Council *v.* City of London Brewery Company	[1898] 1 Q. B. 387	672
London Joint Stock Bank *v.* London Corporation	1 C. P. D. 1; 5 C. P. D. 494; 6 App. Cas. 393	10
Lowe *v.* Pearson	[1899] 1 Q. B. 261	775, 1016
Lucas *v.* Harris	18 Q. B. D. 127	558
—— *v.* Nockells	10 Bing. 157	701
Ludford, In re	13 Q. B. D. 415	67, 461
Ludlow Corporation *v.* Charlton	10 L. J. (Ex.) 75	398
Lumsden *v.* Burnett	[1898] 2 Q. B. 177	471

M.

MacCarthy *v.* Young	6 H. & N. 329; 30 L. J. (Ex.) 227	145, 146
McGrah *v.* Cartwright	23 Q. B. D. 3	503
McIntosh *v.* Pontypridd Improvements Company	61 L. J. (Q.B.) 164	446
McKune *v.* Joynson	5 C. B. (N.S.) 218	743
McNicholas *v.* Dawson	[1899] 1 Q. B. 773	1016
Macrow *v.* Great Western Railway	L. R. 6 Q. B. 612	246
Madeley *v.* Greenwood	42 Sol. J. 34.	461
Man, Ex parte	Mont. & McA. 210	327
Maori King (Owners of Cargo on) *v.* Hughes	[1895] 2 Q. B. 550	57
Margretts *v.* Gregory	10 W. R. 630	318
Marine Insurance Company *v.* China Transpacific Steamship Company	11 App. Cas. 573	582
Martyn *v.* Blithman	Yelv. 197	828
Massey *v.* Heynes	21 Q. B. D. 330	844
Masters *v.* Lowther	11 C. B. 948	628
Mellor *v.* Denham	5 Q. B. D. 467	275
—— *v.* Tomkinson & Co.	[1899] 1 Q. B. 374	776, 1011
Mercer *v.* Vans Colina	67 L. J. (Q.B.) 424	688

		PAGE
Merryweather *v.* Nixan	8 T. R. 186	820
Mersey Docks *v.* Liverpool	L. R. 9 Q. B. 84	672
Mersey Docks and Harbour Board *v.* Inland Revenue Commissioners	[1897] 2 Q. B. 316	256
Meynell *v.* Angell	32 L. J. (Q.B.) 14	548
Middleton *v.* Spicer	1 Bro. C. C. 201	327
Midland Railway Company *v.* Withington Local Board	11 Q. B. D. 788	693
Miles *v.* Harris	12 C. B. (N.S.) 550	461
Milford, The	Swab. 362	965
Minehead Local Board *v.* Luttrell	[1894] 2 Ch. 178	980
Minor, Ex parte	[1893] 1 Q. B. 455	712
Moffatt *v.* Bateman	L. R. 3 P. C. 115	146
Monck *v.* Hilton	2 Ex. D. 268	848
Monks *v.* Jackson	1 C. P. D. 683	852
Montoya *v.* London Assurance	6 Ex. 451	583
Moore *v.* Doherty	5 Ir. L. R. 449	487
—— *v.* Gamgee	25 Q. B. D. 244	432
—— *v.* Holgate	L. R. 1 P. & M. 101	748
Morgan *v.* Davies	3 C. P. D. 260	503
Mortimore *v.* Inland Revenue Commissioners	2 H. & C. 838	130, 339
Moule *v.* Garrett	L. R. 5 Ex. 132; 7 Ex. 101; 39 L. J. (Ex.) 69; 41 L. J. (Ex.) 62	161, 172
Mounsey *v.* Stephenson	7 B. & C. 403	255
Mowbray *v.* Merryweather	[1895] 1 Q. B. 857; 2 Q. B. 640	988
Mumma *v.* Potomac Company	8 Peters, 281	332

N.

National Funds Assurance Company	10 Ch. D. 118	481
Nevill *v.* Fine Arts and General Insurance Company	[1895] 2 Q. B. 156; [1897] A. C. 68	393
Newport Dock Company *v.* Newport Local Board	2 B. & S. 708	278
North British Insurance Company *v.* Lloyd	10 Ex. 523	786
North Eastern Railway Company *v.* Crosland	32 L. J. (Ch.) 353; 2 J. & H. 565; 4 D. F. & J. 550	921, 939

O.

Oriental Bank Corporation *v.* Wright	5 App. Cas. 842	356
Orme, In re	50 L. T. 51	907
Owen *v.* Homan	3 Mac. & G. 378	785

P.

Palmer *v.* Wick and Pulteneytown Steam Shipping Company	[1894] A. C. 318	821
Panama and South Pacific Telegraph Company *v.* India Rubber, Gutta Percha and Telegraph Works Company	L. R. 10 Ch. 515	370
Paradine *v.* Jane	Aleyn, 26	439

		PAGE
Parker, In re	[1894] 3 Ch. 400	318
Parrett Navigation Company *v.* Stower	6 M. & W. 564	471
Parrott *v.* Palmer	3 My. & K. 632	295
Peakin *v.* Peakin	[1895] 2 I. R. 359	487
Pearl *v.* Deacon	24 Beav. 186; 1 De G. & J. 461	318
Pearson *v.* McGowran	3 B. & C. 700	230
Penley *v.* Watts	7 M. & W. 601	164
Penny *v.* Hanson	18 Q. B. D. 478	848
——— *v.* Wimbledon Urban Council	[1898] 2 Q. B. 212	224
Peto *v.* West Ham	2 E. & E. 144	278
Phillips *v.* Foxall	L. R. 7 Q. B. 666	786
——— *v.* Homfray	24 Ch. D. 439	298, 719
——— *v.* Huth	6 M. & W. 573	660
Pidcock *v.* Bishop	3 B. & C. 605	786
Pilcher *v.* Hinds	11 Ch. D. 905	268
Pitman *v.* Universal Marine Insurance	9 Q. B. D. 192	583
Pledge *v.* Buss	Joh. 663	317
Polak *v.* Everett	1 Q. B. D. 669	316
Pomeranian, The	[1895] P. 349	582
Poole *v.* Canning	L. R. 2 C. P. 241	568
Pound *v.* Plumstead Board of Works	L. R. 7 Q. B. 183	684
Powell *v.* Brown	[1899] 1 Q. B. 157	1003
——— *v.* Kempton Park Racecourse Company	[1899] A. C. 143	894
——— *v.* Merrett	1 Sm. & G. 381	329
Powys *v.* Blagrave	4 D. M. & G. 448	298
Pritchard *v.* Bangor Corporation	13 App. Cas. 241	852
Prout *v.* Gregory	24 Q. B. D. 281	864
Pullen *v.* Srelus	48 L. J. (C.P.) 394	955
Purdey *v.* Field	3 Sw. & Tr. 576; 33 L. J. (P. & M.) 13	748

Q.

Quarman *v.* Burnett	6 M. & W. 499	224

R.

Rabbidge, Ex parte	8 Ch. D. 367	711
Raby *v.* Ridehalgh	7 D. M. & G. 104	484
Railton *v.* Mathews	10 Cl. & F. 934	786
Ratcliffe *v.* Evans	[1892] 2 Q. B. 524	89
Rayson *v.* Parton	L. R. 2 P. & M. 38	749
Read *v.* Stedman	26 Beav. 495	329
Reedie *v.* London and North Western Railway Company	4 Ex. 244	224
Rees *v.* Berrington	2 Ves. 540	320
Reg. *v.* Allmey	35 J. P. 534	574
—— *v.* Baker	66 L. T. 416; 56 J. P. 406	636
—— *v.* Beckley	20 Q. B. D. 187	61
—— *v.* Birmingham Waterworks	1 B. & S. 84	278
—— *v.* Bishop	5 Q. B. D. 259	831
—— *v.* Bowman	[1898] 1 Q. B. 663	572
—— *v.* Cambrian Railway Company	L. R. 4 Q. B. 320	925
—— *v.* Christchurch Overseers	27 L. J. (M.C.) 23	398

		PAGE
Reg. *v.* Cooper	1 Q. B. D. 19	80
—— *v.* Cotham	[1898] 1 Q. B. 802	572
—— *v.* Cridland	7 E. & B. 853; 27 L. J. (M.C.) 28	848
—— *v.* Dawson	16 Cox, 556	232
—— *v.* Debruiel	11 Cox, 207	239
—— *v.* De Rutzen	1 Q. B. D. 55.	574
—— *v.* Downes	1 Q. B. D. 25.	287
—— *v.* Foster	24 L. J. (M.C.) 134	80
—— *v.* Francis	L. R. 2 C. C. 128	79
—— *v.* Gibson	18 Q. B. D. 537	491
—— *v.* Grand Junction Railway Company	4 Q. B. 18	672
—— *v.* Hackney Board of Works	L. R. 8 Q. B. 528	684
—— *v.* Heath	L. R. 1 Q. B. 218	1030
—— *v.* Hellingley (Inhabitants)	1 E. & E. 749; 28 L. J. (M.C.) 167	848
—— *v.* Higham	7 E. & B. 557; 26 L. J. (M.C.) 116	848
—— *v.* Hines	80 C. C. C. Sess. Paper, 309	288
—— *v.* Holchester	10 Cox, 226	152
—— *v.* Holmes	12 Q. B. D. 23	233
—— *v.* Holt	Bell C. C. 280; 30 L. J. (M.C.) 11	79
—— *v.* Hurry	76 C. C. C. Sess. Paper, 63	288
—— *v.* Hutchings	6 Q. B. D. 300	748
—— *v.* Jones	1 Den. 551	233
—— *v.* Kay	L. R. 8 Q. B. 324	848
—— *v.* Kent Justices	24 Q. B. D. 181	10
—— *v.* ————	16 L. T. 672	534
—— *v.* Kerswill	[1895] 1 Q. B. 1	307
—— *v.* Leech	7 Cox, 100	233
—— *v.* Liverpool (Revising Barrister of)	[1895] 1 Q. B. 155	112
—— *v.* Mainwaring	27 L. J. (M.C.) 278	5
—— *v.* Martin	L. R. 1 C. C. 56	232
—— *v.* Middlesex (Justices)	2 Q. B. D. 516	848
—— *v.* Midland Railway	L. R. 10 Q. B. 389	278
—— *v.* Neath	L. R. 6 Q. B. 707	278
—— *v.* Padbury	5 Q. B. D. 126	848
—— *v.* Paget	8 Q. B. D. 151	307
—— *v.* Plymouth Corporation	[1896] 1 Q. B. 158	201
—— *v.* Price	5 Q. B. D. 300	275
—— *v.* Prince	L. R. 2 C. C. 154	830
—— *v.* Sharman	[1898] 1 Q. B. 578	571
—— *v.* South Devon Railway Company	15 Q. B. 1043	926
—— *v.* Sutton Harbour Commissioners	2 W. R. 10	931
—— *v.* Tolson	23 Q. B. D. 168	830
—— *v.* Wagstaffe	10 Cox, C. C. 530	288
—— *v.* Welchpool Corporation	35 L. T. 594	389
—— *v.* Whitchurch	7 Q. B. D. 534	275
—— *v.* Whittles	13 Q. B. 248	63
—— *v.* Wigan Corporation	14 Q. B. D. 908	389
Republic of Peru *v.* Peruvian Guano Company	36 Ch. D. 489	91
Rex *v.* Burdett	3 B. & A. 717; 4 B. & A. 95	235
—— *v.* Buttery	Cited 4 B. & A. 179	230
—— *v.* Devon Justices.	1 M. & S. 411	535
—— *v.* Forrest.	3 T. R. 38	534
—— *v.* Friend	R. & R. 20	288

		PAGE
Rex *v.* Pasmore	3 T. R. 199	331
—— *v.* Sainsbury	4 T. R. 451	61
Ricardo *v.* Maidenhead Local Board	27 L. J. (M.C.) 73	535
Richards, Ex parte	4 D. & Ch. 190	327
———— *v.* Noble	3 Mer. 673	295
Richmond *v.* White	12 Ch. D. 361	908
Ritchie *v.* Larsen	[1899] 1 Q. B. 727	738
Roberts *v.* Crowe	L. R. 7 C. P. 629	167
Robertson *v.* Ewer	1 T. R. 127	582
Robinson *v.* Barton-Eccles Local Board	8 App. Cas. 798	685
———— *v.* Jenkins	24 Q. B. D. 275	549
Rochdale Union and Haslingden Union, In re	[1898] 2 Q. B. 206; [1899] 1 Q. B. 540	517
Rogers *v.* Ingham	3 Ch. D. 351	481
——— *v.* Lambert	[1891] 1 Q. B. 318	549
Ross, Ex parte	2 G. & J. 46, 330	327
Rowell *v.* Inland Revenue Commissioners	[1897] 2 Q. B. 194	348
Roy *v.* Beaufort (Duke)	2 Atk. 190	384
Royal Aquarium Society *v.* Parkinson	[1892] 1 Q. B. 431	457
Royal College of Music *v.* Westminster Vestry	[1898] 1 Q. B. 809	875
Royal College of Physicians *v.* General Medical Council	62 L. J. (Q.B.) 329	638
Ruabon Brick Company *v.* Great Western Railway Company	[1893] 1 Ch. 427	924
Ruabon Steamship Company *v.* London Assurance	[1898] 1 Q. B. 722	582

S.

Sadler *v.* Great Western Railway Company	[1896] A. C. 450	841
St. Giles, Camberwell *v.* Crystal Palace Company	[1892] 2 Q. B. 33	684
———————— *v.* Hunt	56 L. J. (M.C.) 65	684
St. James and St. John, Clerkenwell (Vestry) *v.* Feary	24 Q. B. D. 703	754
St. Mary, Battersea *v.* Palmer	[1897] 1 Q. B. 220	684
Salomon *v.* Salomon & Co.	[1897] A. C. 22	615
Sanders *v.* Maclean	11 Q. B. D. 327	661
Sapsford *v.* Fletcher	4 T. R. 511	164
Saunders *v.* Pawley	14 Q. B. D. 234	268
Savoy Overseers *v.* Art Union of London	[1896] A. C. 296	876
Sawyer *v.* Sawyer	28 Ch. D. 595	482
Schofield, Ex parte	[1891] 2 Q. B. 428	275
Scott *v.* Brown	[1892] 2 Q. B. 724	819
—— *v.* Morley	20 Q. B. D. 120	567
Seaman *v.* Burley	[1896] 2 Q. B. 344	274
Seymour *v.* Coulson	5 Q. B. D. 359	503
Shackell *v.* Rosier	2 Bing. N. C. 634	828
Shaw *v.* Caledonian Railway Company	17 R. 466	798
—— *v.* Foster	L. R. 5 H. L. 321	363
—— *v.* Morley	L. R. 3 Ex. 137	894
Shears *v.* Goddard	[1896] 1 Q. B. 406	619
Shephard, In re	43 Ch. D. 131	719
Shepherd *v.* Harrison	L. R. 5 H. L. 116	645
Sheppard *v.* Union Bank of London	7 H. & N. 661	659

		PAGE
Short *v.* Daly	1 Lawson's Registration Cases (Irish) 310	97
Shrewsbury's (Countess) Case	5 Rep. 13 a	297
Silver Valley Mines, In re	21 Ch. D. 381	961
Simmonds, Ex parte	16 Q. B. D. 308	906
Skingley, In re	3 Mac. & G. 221	300
——— *v.* Surridge	11 M. & W. 503	399
Sleat *v.* Fagg	5 B. & A. 342	310
Smith *v.* Baker	[1891] A. C. 325	504
——— *v.* Chandler	22 Q. B. D. 208	104, 118
——— *v.* Lancashire and Yorkshire Railway Company	W. N. (1898) 165	263
——— *v.* ———	[1899] 1 Q. B. 141	775, 1016
——— *v.* Sorby	3 Q. B. D. 552, n.	371
Smurthwaite *v.* Hannay	[1894] A. C. 494	844
Smyth *v.* Wilson	36 L. J. (P. & M.) 82; 15 L. T. 446	749
Sneary *v.* Abdy	1 Ex. D. 299	461
Snow *v.* Hill	14 Q. B. D. 588	895
Solomon, Ex parte	1 G. & J. 25	909
Soutter *v.* Roderick	[1896] 1 Q. B. 91	97
Stahlschmidt *v.* Lett	1 Sm. & Giff. 415	907
Stammers *v.* Elliott	L. R. 3 Ch. 195	908
State Bank *v.* The State	1 Blackford's Indiana Rep. 267	327
Steel *v.* Dixon	17 Ch. D. 825	317
Stephens, In re	43 Ch. D. 39	887
Stevens *v.* Midland Counties Railway Company	10 Ex. 352	392
Stevenson *v.* Newnham	13 C. B. 285	619
Stewart *v.* Steele	5 Scott N. R. 927	583
Stewart's Application, In re	13 Rep. Pat. Cas. 627	913
Stoddart *v.* Sagar	[1895] 2 Q. B. 474	200
Stone *v.* Compton	5 Bing. N. C. 142	786
Strickland *v.* Hayes	[1896] 1 Q. B. 290	427
Suffield and Watts, In re	20 Q. B. D. 693	864
Sulley *v.* Royal College of Surgeons of Edinburgh	19 R. 751; 29 S. L. R. 620	876
Sutton *v.* Sutton	22 Ch. D. 511	885
Svendsen *v.* Wallace	13 Q. B. D. 69; 10 App. Cas. 404	583
Swann *v.* Falmouth (Earl of)	8 B. & C. 456	471

T.

Tailors in Glasgow (Incorporation) *v.* Inland Revenue Commissioners	14 R. 729; 24 S. L. R. 516	876
Tall *v.* Ryland	1 Ch. Cas. 183	383
Tanner *v.* European Bank	L. R. 1 Ex. 261	548
Tarn *v.* Turner	39 Ch. D. 456	996
Taylor *v.* Bank of New South Wales	11 App. Cas. 596	317
——— *v.* Caldwell	3 B. & S. 826	438
——— *v.* Collier	30 W. R. 701	716
——— *v.* Haygarth	14 Sim. 8	327
——— *v.* Pendleton Overseers	19 Q. B. D. 288	260
——— *v.* Smetten	11 Q. B. D. 207	200
——— *v.* Zamira	6 Taunt. 524	164
Tennant *v.* Field	8 E. & B. 336	471

		PAGE
Tew, In re	L. R. 8 Ch. 569	813
Thames Conservators *v.* Inland Revenue Commissioners	18 Q. B. D. 279	250
Theobald *v.* Railway Passengers Assurance Company	10 Ex. 45	356
Thomas *v.* Harries	1 Man. & G. 695	471
Thompson *v.* Havelock	1 Camp. 527	373
——— *v.* Lapworth	L. R. 3 C. P. 149	474
Thursby *v.* Briercliffe with Extwistle	[1895] A. C. 32	278
Thurso New Gas Company, In re	42 Ch. D. 486	619
Tipping *v.* Power	1 Hare, 405	908
Tomlinson *v.* Broadsmith	[1896] 1 Q. B. 386	716
Toplis *v.* Baker	2 Cox, 118	886
Trafford *v.* Boehm	3 Atk. 440	482
Treloar *v.* Bigge	L. R. 9 Ex. 151	836
Tremeere *v.* Morison	1 Bing. N. C. 89	177
Tuff, In re	19 Q. B. D. 88	814
Turner *v.* Doe	9 M. & W. 643	996
Tuther *v.* Caralampi	21 Q. B. D. 414	383
Twiss *v.* Massey	1 Atk. 67	333

U.

Ulverstone and Lancashire Railway Company *v.* Inland Revenue Commissioners	2 H. & C. 855	339
Underden *v.* Burgess	4 Dow. P. C. 104	628
Universal Stock Exchange *v.* Stevens	40 W. R. 494	798
——— *v.* Strachan	[1896] A. C. 166	794

V.

Van Gelder's Patent	6 Rep. Pat. Cas. 22	913

W.

Wale *v.* Inland Revenue Commissioners	4 Ex. D. 270	132
Walker *v.* Nussey	16 M. & W. 302	401
Washborn *v.* Black	11 East, 405, n.	471
Waterhouse *v.* Keen	4 B. & C. 200	693
Watkins *v.* Barnard	[1897] 2 Q. B. 521	700
Watson *v.* Petts	[1899] 1 Q. B. 54	431
West London Syndicate *v.* Inland Revenue Commissioners	[1898] 2 Q. B. 507	129
West Middlesex Waterworks Company *v.* Coleman	14 Q. B. D. 529	672
Western Counties Manure Company *v.* Lawes Chemical Manure Company	L. R. 9 Ex. 218	89
Western National Bank of City of New York *v.* Perez, Triana & Co.	[1891] 1 Q. B. 304	715
White *v.* France	2 C. P. D. 308	146
——— *v.* Mellin	[1895] A. C. 154	88
Wilkinson *v.* Collyer	13 Q. B. D. 1	477
Williames, Re	52 L. T. 41; 54 L. T. 105	296, 297
Williams, In re	8 Morr. 65	906
Wilson *v.* Bank of Victoria	L. R. 2 Q. B. 203	589
Withernsea Brickworks, In re	16 Ch. D. 337	704

		PAGE
Wood *v.* Dummer	3 Mason, 308	332
——— *v.* Widnes Corporation	[1898] 1 Q. B. 463	754
Woodhouse *v.* Walker	5 Q. B. D. 404	296
Woolford's Estate (Trustee of) *v.* Levy	[1892] 1 Q. B. 772	461
Writers to the Signet *v.* Inland Revenue Commissioners	14 R. 34; 24 S. L. R. 27	875
Wulff *v.* Jay	L. R. 7 Q. B. 756	318

Y.

Young, Ex parte	19 Ch. D. 124	718
——— *v.* Ferrie	4 Sw. & Tr. 210; 29 L. J. (P. & M.) 69	748
——— *v.* Macrae	3 B. & S. 264	89

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1898. 1899.

WANDSWORTH BOARD OF WORKS, APPELLANTS; PRETTY, RESPONDENT.

1898
Oct. 27.

Metropolis—Streets—Offences—Exposing Goods for Sale on Carriageway—Penalty—The Metropolitan Police Act, 1839 (2 & 3 *Vict. c.* 47), *s.* 60—*The Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 *Vict. c.* 5), *s.* 1—*Police Regulations of December* 28, 1869.

Sect. 60, sub-s. 7, of the Metropolitan Police Act, 1839, renders liable to a penalty every person who exposes anything for sale upon any carriageway or footway so as to cause an annoyance or obstruction in any thoroughfare within the metropolitan police district. By police regulations made under the Metropolitan Streets Act Amendment Act, 1867, and issued on December 28, 1869, costermongers, street hawkers, itinerant traders, and their barrows, carts, and stalls, are made liable to be removed from any street and public way in which they create an obstruction to the traffic or are an annoyance to the inhabitants:—

Held, that such regulations did not impliedly repeal s. 60, sub-s. 7, of the Metropolitan Police Act, 1839, nor had they the effect of superseding the penalty imposed by that sub-section.

CASE stated by one of the metropolitan police magistrates sitting at the South Western Police Court.

1898

WANDSWORTH BOARD OF WORKS v. PRETTY.

The respondent was summoned before the magistrate to answer a complaint made by the appellants that she had unlawfully exposed for sale celery upon the carriageway in a thoroughfare called Balham High Road, in the metropolitan police district, so as to cause annoyance and obstruction in the said thoroughfare, contrary to the provisions of the Metropolitan Police Act, 1839, s. 60. (1)

Upon the evidence given at the hearing of the complaint the magistrate found as facts—that the respondent was a costermonger, and that she did expose celery for sale upon the carriageway in a thoroughfare within the metropolitan police district in such a manner as to create obstruction to the traffic and annoyance to the inhabitants. The magistrate was therefore of opinion that she was not carrying on her business in accordance with the regulations, but he dismissed the summons on the ground that the remedy of removal given by the 6th regulation superseded the remedy provided by 2 & 3 Vict. c. 47, and therefore that he had no power to inflict a fine upon the respondent.

(1) 2 & 3 Vict. c. 47, s. 60, provides (sub-s. 7) that "every person who shall expose anything for sale . . . . upon or so as to hang over any carriageway or footway . . . . so as to cause annoyance or obstruction in any thoroughfare shall be liable to a penalty of not more than 40s."

The Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 6, provides: "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods and other articles, under a penalty not exceeding 40s."

The Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1, provides that s. 6 of the Metropolitan Streets Act, 1867, "shall not apply to costermongers, street hawkers, or itinerant traders, so long as they carry on their business in accordance with the regulations from time to time made by the Commissioner of Police, with the approval of the Secretary of State."

Regulations made by the Commissioner of Police and approved by the Secretary of State were issued on December 28, 1869, and are still in force.

Regulation 6 provides that "costermongers, street hawkers and itinerant traders and their barrows, carts and stalls are hereby made liable to be removed from any street and public way in which they cause an obstruction to the traffic, or where they are an annoyance to the inhabitants."

1898

WANDSWORTH BOARD OF WORKS v. PRETTY.

The questions for the opinion of the Court were whether s. 60, sub-s. 7, of 2 & 3 Vict. c. 47, was impliedly repealed or superseded by the regulations, and whether the magistrate's decision was right in law.

Horace Avory, for the appellants, submitted that s. 60, sub-s. 7, of 2 & 3 Vict. c. 47, was not impliedly repealed or superseded by the regulations of December 28, 1869, and that the magistrate ought to have convicted the respondent.

No counsel appeared for the respondent.

LORD RUSSELL of KILLOWEN C.J. I am of opinion that there is not the least ground for saying that s. 60, sub-s. 7, is impliedly repealed by these regulations; nor is there any ground whatever for saying that the remedy given by the regulations supersedes the remedy given by the statute. The statute and the regulations do not seem to cover the same ground. Sect. 60, sub-s. 7, provides that every person shall be liable to a penalty who exposes anything for sale upon, or so as to hang over, a carriageway or footway so as to cause annoyance or obstruction in a thoroughfare; whilst the 6th regulation provides that costermongers, street hawkers and traders and their barrows, carts and stalls are liable to be removed from any street and public way if they cause an obstruction to the traffic, or where they are an annoyance to the inhabitants. I think that the magistrate's judgment was wrong in point of law, and this case must be sent back to him to convict.

WILLS J. I agree.

Case remitted accordingly.

Solicitors for appellants: *W. W. Young & Son.*

W. A.

1898
Oct. 29.

MORRIS, APPELLANT; DUNCAN, RESPONDENT.

Justices—Summary Proceedings—Limitation of Time—Recovery of Penalties—Offences under Salmon Fishery Acts—Salmon Fishery Act, 1873 (36 & 37 *Vict. c.* 71), *s.* 62—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

The effect of s. 62 of the Salmon Fishery Act, 1873, and s. 11 of the Summary Jurisdiction Act, 1848, is that a penalty for an offence under the Salmon Fishery Acts may be recovered summarily if the complaint be made within six months from the commission of the offence.

CASE stated, under the Summary Jurisdiction Acts, by two justices of the county of Durham.

On April 29, 1898, the appellant, an officer of the Fishmongers' Company, London, preferred an information against the respondent for the offence of having unlawfully had in his possession, on November 9, 1897, an unseasonable salmon, contrary to the provisions of s. 14 of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), which provides that "no person shall . . . . (2.) have in his possession any unclean or unseasonable salmon, or any part thereof," under a penalty, not exceeding 5*l.*, in respect of each fish. The summons was issued on April 29, 1898, and served on the respondent on May 3, 1898, and the matter of the information came on to be heard before the justices, sitting as a court of summary jurisdiction, on May 11, 1898.

Facts were proved before the justices which, in their opinion, constituted the offence charged in the information; but they dismissed the information upon the ground that, having regard to s. 62 of the Salmon Fishery Act, 1873 (1), they had no power

(1) The Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 62: "All penalties imposed by the Salmon Fishery Acts, 1861 to 1873 . . . . and all sums of money, costs and expenses by the said Acts or either of them directed to be recovered in a summary manner may be recovered within six months after the commission of the offence before two justices, in manner directed by . . . . 11 & 12 Vict. c. 43, or any Act amending the same."

11 & 12 Vict. c. 43 (Jervis's Act), s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any . . . . complaint or laying any . . . . informa-

1898

MORRIS v. DUNCAN.

to convict the respondent because more than six months had elapsed since the date of the offence.

The question for the opinion of the Court was whether they were right in so dismissing the information.

Lawson Walton, Q.C. (*Travers Humphreys* with him), for the appellant. The expression "recovered" in s. 62 of the Salmon Fishery Act, 1873, is ambiguous. It may mean that the proceedings shall be instituted within six months from the commission of the offence, or that the penalty shall be recovered within that period by the judgment of the Court. It is submitted that the first meaning is the true one. The second would lead to great inconvenience and uncertainty, as where the proceedings were instituted, and the case came for hearing before the court of summary jurisdiction, within six months from the commission of the offence, but the Court adjourned to a date beyond the six months. The Legislature cannot have intended that the ends of justice might be defeated if by some accident—such as the illness of a witness or of a magistrate—judgment was not given within the six months. Reading s. 62 of the Act of 1873 with s. 11 of Jervis's Act, the limitation of time provided by the latter enactment is made applicable; it is sufficient if the complaint be made within six months of the commission of the offence. In *Reg.* v. *Mainwaring* (1) the meaning of a similar provision with respect to the recovery of penalties in 18 & 19 Vict. c. 108, s. 14, was discussed but not decided.

No counsel appeared for the respondent.

WILLS J. I regret that we must decide this case without having had the benefit of an argument for the respondent; but the question, though an important one, lies within a narrow compass, and the contentions which would have been put forward for the respondent, had counsel appeared for him, are sufficiently obvious to enable us to deal with the matter. I do

tion in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

(1) (1858) 27 L. J. (M.C.) 278.

1898

MORRIS v. DUNCAN.

Wills J.

not agree with the argument of the appellant's counsel that the term "recovery" taken by itself is ambiguous. As applied to a sum of money, a penalty, or a debt, "recovery" is perfectly well understood to mean the obtaining of the judgment of the Court, upon which the sum, penalty, or debt becomes payable. That being so, the limitation provided by the Salmon Fishery Act, 1873, is to the period of recovery, and not to the commencement of the proceedings to recover. If Jervis's Act were out of the question, possibly the summons might be issued upon the last day of the six months, and if it were possible to have it heard on the same day, it would still be in time: or possibly in order to get a recovery within the period of six months it would be necessary to commence proceedings at some time, varying according to the practice of the particular petty sessions which had to deal with the case, before the expiration of the six months. That seems to shew that the period of limitation given in the Salmon Fishery Act, 1873, is not a definite one, and is not what is meant in Jervis's Act by a "time specially limited for making a complaint or laying an information." I think that s. 11 of Jervis's Act means that, in all cases where there is no Act of Parliament which definitely says that the time for making the complaint or laying the information must be within a specified and defined period, the time within which the proceedings may be commenced shall be six months. I think that that is obviously the meaning of s. 11. There is no possible injustice in so construing it—no straining of the language used; and such a construction is, in my view, necessary in order to give full and proper effect to the section. One important object of Jervis's Act was to secure uniformity of procedure in all matters in which a departure from uniformity was not essential, and was not specially provided for by the particular Act of Parliament. I am of opinion, therefore, that our judgment should be for the appellant, and that the case should be remitted to the magistrate to be heard upon the merits.

CHANNELL J. I am of the same opinion. I do not think there is any indication in s. 62 of the Salmon Fishery Act,

1873, of an intention to impose a different limit of time to that imposed by s. 11 of Jervis's Act. The main object of s. 62 was, no doubt, to authorize proceedings before justices. It is a repetition of the first part of s. 35 of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), which provided the tribunal before whom penalties should be recovered. Sect. 35 was repealed, and s. 62 of the Act of 1873 was substituted for it. The first words of s. 62 are identical with those of s. 35 of the earlier Act, the main object of s. 62 being also, there is no doubt, to provide the tribunal. I am of opinion that s. 62 means that the penalty may be recovered before two justices in the manner which is provided by Jervis's Act—that is to say, within six months after the commission of the offence, and that consequently the complaint may be made within that period.

1898

MORRIS v. DUNCAN.

Channell J.

Judgment for the appellant. Case remitted.

Solicitor for appellant: *C. O. Humphreys.*

W. A.

WILLIAMSON, APPELLANT *v.* NORRIS, RESPONDENT.

1898

Nov. 1, 2, 3.

Licensing Acts—Offences—Sale without Licence—House of Commons—Sale by Servant of the House—Charge against Servant—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The provisions of s. 3 of the Licensing Act, 1872, imposing penalties for unlawful sale of liquor without a licence, do not apply to a servant selling liquor, the property of his master, by his master's order.

The respondent, a servant of the House of Commons, sold liquor, the property of the House, at a bar within the precincts of the House. The purchaser of the liquor was not a member of either House of Parliament, and the place where it was sold was not licensed for the sale of liquor.

On a case stated on an information charging the respondent with unlawfully selling liquor which he was not licensed to sell, contrary to s. 3 of the Licensing Act, 1872:—

Held, that the respondent was not guilty of an offence against the Act, and could not be convicted.

CASE stated by a metropolitan police magistrate.

An information preferred by the appellant against the

1898

WILLIAMSON v. NORRIS.

respondent, charging that the respondent, on May 2, 1898, at St. Stephen's Hall in the Palace of Westminster, did unlawfully sell by retail certain intoxicating liquor, which he was not then licensed to sell by retail, contrary to s. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), was heard and determined by the magistrate, and was dismissed.

On May 2, 1898, about 8 P.M., the appellant, entering Westminster Palace in the usual way, and passing through St. Stephen's Hall, proceeded to the bar at the foot of the Committee Room staircase, and called for a glass of brandy and soda. This was supplied to him by the respondent, who accepted half-a-crown in payment therefor, returning eighteenpence to the appellant as change. At the same time two other persons were supplied with two glasses of whisky and Apollinaris water by the respondent, who accepted money from them in payment therefor.

The respondent, while he was so acting, was acting as the servant of the House of Commons, and in obedience to orders which he had received on their behalf through the Kitchen Committee of the House, by whom he was paid; the liquor which he delivered was the property of the House of Commons, and paid for by the Kitchen Committee, there being an annual vote of the House for the refreshment department; the money which he received he received for and on behalf of the House of Commons, and paid over to the Kitchen Committee. The bar at which the liquor was delivered was under the general control of the Kitchen Committee, above the bar being a tariff shewing the prices of various intoxicating liquors.

The appellant was not, when the liquor was delivered to him, a member of either House of Parliament. The Palace of Westminster is not a place licensed for the sale of intoxicating liquor.

It was contended for the respondent that the sale of liquor in this case was a sale by the House of Commons, and not by the respondent, and also that the provisions of the Licensing Act, 1872, did not apply to sales of intoxicating liquor in the Palace of Westminster.

The magistrate held that the fact that the respondent was a

servant would be no defence to the charge of selling liquor made against him, if the sale were illegal under the Act, but that s. 3 of 35 & 36 Vict. c. 94, and the other provisions of the Act, did not apply within the Palace of Westminster to sales of liquor by the House of Commons.

The questions for the opinion of the Court were :—

1. Whether there was a sale of intoxicating liquor by the respondent, within the meaning of 35 & 36 Vict. c. 94, s. 3.

2. Whether s. 3, and the other provisions of the statute, applied within the Palace of Westminster.

3. Whether, under the circumstances, the respondent was guilty of the offence.

Nov. 1, 2. *Asquith, Q.C.* (*H. L. Stephen* with him), for the appellant. The magistrate was wrong in refusing to convict the respondent. The case primâ facie comes within the express prohibition contained in s. 3 of the Licensing Act, 1872. (1) There is an exemption clause in s. 72, enumerating a series of matters and places to which the Act is not to apply, but that section does not refer to the Houses of Parliament. The doctrine that the Crown is not bound by an Act of Parliament if not named does not apply to the House of Commons. Even if the House can be described as a Royal Palace, the respondent was not a servant of the Queen, but, as found in the case, of the House of Commons. As to a sale by a servant being an offence, that point has been found against the respondent by the magistrate.

The Attorney-General (*Sir Richard Webster, Q.C.*), (*H. Sutton* and *Avory* with him), for the respondent. In the first place, the Licensing Acts do not apply in any way to the House of Commons. By 1 & 2 Vict. c. 7, s. 5, and 30 & 31 Vict. c. 40,

(1) 35 & 36 Vict. c. 94. By s. 3, "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his licence to sell the same, shall be subject to the following penalties"; and the section goes on to provide penalties for the first, second, third, and subsequent offences.

1898

WILLIAMSON v. NORRIS.

s. 2, the House of Commons is vested in the Queen. The Houses of Parliament do not come within the Rating Acts: *Leith Harbour and Docks Commissioners* v. *Inspector of the Poor* (1), per Lord Cranworth C. (2) It does not follow that, because the House of Commons is not expressly mentioned in the list of exemptions contained in s. 72, the Act applies: s. 72 is not exhaustive. The whole of the Act must be looked at to see whether it can apply, and not merely the special words of exemption: *London Joint Stock Bank* v. *Mayor of London* (3), per Curiam (4); *Reg.* v. *Kent Justices.* (5) A club has been held not to come within this Act, though not excepted by s. 72: *Graff* v. *Evans.* (6) The House of Commons has power to regulate its own internal procedure: *Bradlaugh* v. *Gossett* (7); and to hold that it was subject to the Licensing Acts would be to take away this right. It is clear that many of the provisions of the Licensing Acts could not possibly be made applicable to the House of Commons; for instance, in the Act of 1872 (35 & 36 Vict. c. 94), the provision, in s. 3 as to forfeiture of liquor; s. 4, making all the occupiers liable; s. 11, as to painting or fixing up the name of the licensed person; s. 18, as to excluding drunken persons; s. 23, empowering justices to close the premises in case of riot; s. 25, imposing penalties on persons found on premises during closing hours; s. 26, as to exemption from closing in certain cases; s. 45, as to qualification of premises; ss. 46, 47, as to annual value; and in the Act of 1874 (37 & 38 Vict. c. 49), s. 3, as to closing hours; s. 16, as to entry by police constable; s. 17, as to search for liqour.

[WILLS J. referred to s. 64 of the Act of 1872, as to production of licence by the holder.]

The following statutes were also referred to on this point: 11 Geo. 4 and 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; 3 & 4 Vict. c. 61; 23 & 24 Vict. c. 27; 32 & 33 Vict. c. 27; 33 & 34 Vict. c. 29.

(1) (1866) L. R. 1 H. L., Sc. 17.
(2) L. R. 1 H. L., Sc. at p. 20.
(3) (1875) 1 C. P. D. 1; affirmed (1880) 5 C. P. D. 494, and (1881) 6 App. Cas. 393.
(4) 1 C. P. D. at p. 17.
(5) (1889) 24 Q. B. D. 181.
(6) (1882) 8 Q. B. D. 373.
(7) (1884) 12 Q. B. D. 271.

Secondly, assuming that the Licensing Acts do apply, and that an offence has been committed against s. 3 of the Act of 1872, the case states that the respondent was acting as the servant of the House of Commons, and in obedience to orders, and there is no evidence or suggestion of any guilty knowledge on his part. This being so, he cannot be held to be criminally liable. The provision in s. 3, that "no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same," cannot apply to the act of a mere servant in supplying the liquor and receiving the money in obedience to orders, but applies to the person having control of the sale, and who ought to be licensed in order to justify the sale. A barman never is licensed, and is not a "licensed person," within the meaning of s. 74 of the Act of 1872. If guilty knowledge on the part of the servant were proved, the case might come within the enactment contained in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5, "That every person who shall aid, abet, counsel, or procure the commission of any offence . . . . punishable on summary conviction, shall be liable to be proceeded against and convicted for the same." The provisions of s. 62 of the Act of 1872, relating to the evidence necessary to prove sale or consumption of intoxicating liquor, shew further that the penal provisions of s. 3 cannot have been intended to apply to a servant.

Asquith, Q.C., in reply. The fact that certain provisions of the Licensing Acts would be inapplicable cannot prevent the application of s. 3 of the Act of 1872, the express words of which amount to an absolute prohibition. *Reg.* v. *Kent Justices* (1) has no bearing on the present case, for there the weights and scales were the property of the Crown, and the Crown was not mentioned in the Act.

The case of a servant falls within s. 3 of the Act of 1872, for the words "no person shall sell," &c., are wide enough to include it. The words in the same section, "without being duly licensed," &c., are equivalent to "without being protected by a licence."

Cur. adv. vult.

(1) 24 Q. B. D. 181.

1898

WILLIAMSON v. NORRIS.

Nov. 3. LORD RUSSELL of KILLOWEN C.J. The question which we have to decide comes before us on a case stated by a metropolitan police magistrate, before whom the respondent was charged with an offence against s. 3 of the Licensing Act, 1872, in selling by retail intoxicating liquor which he was not licensed to sell. Two questions are involved in the case: first, whether an offence against the Act was committed at all, and, secondly, if an offence against the Act was committed, whether the respondent was the party who committed the offence, within the meaning of the Act. On the facts which are set out in the case being proved, the contention on behalf of the respondent was, that the sale of the liquor was a sale by the House of Commons, and not by the respondent, and that the Licensing Act, 1872, did not apply to the sale of liquor in the Palace of Westminster. The magistrate came to the conclusion that the fact that the respondent was a servant would be no defence to the charge against him, if the sale were illegal under the Act, but that the provisions of the Act did not apply, within the Palace of Westminster, to sales of liquor by the House of Commons, and he dismissed the information. We have now to say whether the decision of the police magistrate was right.

Of the two questions involved, I will first consider the question, whether any offence at all against the Act has been committed. It was argued for the respondent that no offence had been committed, on the ground that the Houses of Parliament, in the regulation of their internal arrangements as to the sale of liquor, were entirely outside the control of the law as to licensing. Having regard to the view which we take of the other question to which I have referred, it is not necessary for us to decide this question; but I think it right to say that I am far—very far from being satisfied that no offence has been committed. I am not at all impressed by the argument that because many of the provisions of the Licensing Acts cannot be worked with reference to the House of Commons, therefore the Acts do not apply. It does not follow that intoxicating liquor can lawfully be sold without a licence, because some of the provisions of the Licensing Acts are inapplicable. Sect. 3 of the

Licensing Act, 1872, begins with a very sweeping prohibition against the sale of intoxicating liquor by unlicensed persons: "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same." Then follow various provisions for the purpose of carrying out the objects of the Act, and there is a long series of exceptions in s. 72, which does not include the present case. I am far from saying that no offence has been committed by those under whose authority the sale took place. I wish to add that, in the face of the doubt, the very grave doubt, which exists, it is obvious that an appeal should be made to the Legislature to legalise and regulate what is going on, if Parliament thinks it expedient that the sale of liquor should take place within the precincts of the Houses of Parliament.

The next question is, Did the respondent in the present case commit the offence against the Act if an offence were committed? In order to arrive at a conclusion as to this point, it becomes necessary to examine the provisions of s. 3, and on reading that section I think it is impossible not to see that, in order to bring the innocent act of a waiter or a barman within the penal clause, it is necessary to put a strong gloss on the words of the section. I am of opinion that the true meaning of the section is, that the sale which is prohibited must be a sale by the person who ought to be licensed. Every one knows that a barman or a waiter is not a person licensed. The sale struck at is a sale by the master or the principal. It is contended for the appellant that s. 3 ought to be read as if the words "without being duly licensed" were "without being protected by a licence"; but that would be putting a violent gloss upon the words, and to do so is not necessary for the purpose of giving effect to the Act. It may be that the act of sale is primâ facie evidence of an offence, so that, if a sale is proved, the burden of proof lies on the party charged; but it is unnecessary to inquire as to this, for when once it appears that the person who gives the liquor and receives the money is a mere servant, and is not knowingly accessory to an illegal sale, it is clear that he has committed no offence; if he acted knowingly he could be

1898

WILLIAMSON v. NORRIS.

Lord Russell C.J.

convicted of aiding and abetting under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 5. It is true that there are cases where the Legislature in its wisdom has declared that, in the particular class of cases dealt with, a man is to be treated as guilty of the offence in question, although he has not acted with negligence, and had no guilty mind. There are several such cases, but they form an exception to the general rule of law. The general rule of English law is, that no crime can be committed unless there is mens rea. In the present case the respondent was a mere servant, appointed by the Kitchen Committee of the House of Commons. Can it be suggested that this man, who was appointed by, and acted under authority of, the House of Commons, and so was under the ægis of a responsible body, had such a guilty mind as to be liable to a criminal conviction? Would it be fair or equitable, would it be just, to hold, under such circumstances as those of the present case, that the respondent has committed a crime? I am of opinion that, if there was any offence at all, it was an offence committed by those who authorized the sale, and therefore the respondent is not liable to be convicted.

The result is that, on different grounds from those taken by the learned magistrate, I arrive at the same conclusion as he arrived at, which is, that no offence was committed by the respondent, and therefore the magistrate's decision dismissing the information must be affirmed.

WILLS J. I am of the same opinion, and I entirely concur in all the observations which have been made by the Lord Chief Justice. The construction contended for by the appellant requires that "authorized by his licence" should be read as equivalent to "acting under the authority of some one else having a licence." It is a great straining of the language. "Licence" and "licensed" are used everywhere else in the Act in their natural sense, and the second member of the phrase so read would be a very odd alternative to the first, whereas "sell without being licensed or in a place to which the licence does not apply" is a perfectly natural and intelligible pair of alternatives.

1898

WILLIAMSON v. NORRIS.

Wills J.

Further, a great part of the argument on behalf of the respondent as to the application of the Licensing Acts rests on the common fallacy that the result produced cannot have been contemplated, and therefore it necessarily follows that the case does not come within the words of the statute. Such an argument as this ought to have effect only within very narrow limits. Generally one has to consider what is said in the Act, and this is the only way of arriving at a right conclusion, and if that is clear, it is nothing to the purpose that possibly results may follow which were not foreseen. I share to the full the doubts expressed by the Lord Chief Justice, as to whether there has not been a breach of the Act of Parliament, but I agree that no offence has been committed by the respondent.

Judgment for the respondent.

Solicitors for appellant: *Todd, Dennes & Lamb.*
Solicitor for respondent: *The Treasury Solicitor.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.

1898

Nov. 19.

WOODHAM *v.* ATLANTIC TRANSPORT COMPANY, LIMITED.

Employer and Workman—Compensation—Personal Injury by Accident—Employment on or about Machinery or Plant—Ship unloading in Dock—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *s.* 7, *sub-ss.* 1, 2.

Where a ship was unloading in a dock by means of a crane on the quay hired by her owners, and a workman employed by them in unloading her was killed by the explosion of a case of percussion-caps which he was placing in a basket attached to the chain of the crane for the purpose of its being hoisted out of the ship on to the quay:—

Held, that the accident arose out of and in the course of the workman's employment on or about machinery used in the process of unloading to a quay within the meaning of the Workmen's Compensation Act, 1897, and therefore the Act applied to it.

APPEAL from the decision of the judge of the Bow County Court upon a question of law submitted to him by an arbitrator

C. A. 1898

WOODHAM v. ATLANTIC TRANSPORT COMPANY.

appointed to assess compensation under the Workmen's Compensation Act, 1897.

The respondent, who was the widow of a man named Woodham, had claimed compensation from the appellants under the Act on behalf of herself and children in respect of her husband's death which was caused by an explosion on board the appellants' ship *Manitoba*.

The following facts were admitted by the appellants. On July 6, 1898, Woodham was employed with other men by the appellants in unloading the *Manitoba*, and was on that date killed while working on the ship in the Royal Albert Docks, the cause of his death being injuries received through the explosion of two cases of primers or percussion-caps. The ship was at the time of the accident lying at the quay of the Royal Albert Docks, No. 22 shed, moored thereto. The deceased, together with a number of other men, was sent by the foreman stevedore, who was in charge on behalf of the appellants of the work of unloading, with instructions to unload and discharge the cases of cartridges that were stowed in the ship. The cases of cartridges were unloaded in the following manner. The cases were brought from the hold by means of an hydraulic crane, standing on the quay, which was hired for the purpose by the appellants from the dock company. The crane was worked by a chain to the end of which was attached a wicker basket. The basket was at all times attached to the crane. The cases in question were brought out of the baggage-room of the ship; and the men, among whom was the deceased, placed them into the basket, whereupon the crane was set in motion, and the basket and its contents were hoisted from the vessel and placed on the quay. The crane was worked by a man named Wood who was in the employment of the appellants. About seventeen cases having been safely landed by the crane it had returned for the last set of cases, and the basket was being loaded by the deceased and another man. Four of the remaining five cases had been placed in the basket, and the fifth, which was a case of primers or percussion-caps, was placed in the basket by the deceased when it immediately exploded, thereby causing the injuries of which he died. The

question for the county court judge was whether, under the above-mentioned circumstances, the Workmen's Compensation Act, 1897, applied. He decided that it did apply.

Joseph Walton, Q.C., and *Kilburn*, for the appellants. Sect. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, provides that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Sect. 7, sub-s. 1, of the Act provides that "this Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about" (among other things specified) "a factory." Sect. 7, sub-s. 2, provides that "in this Act . . . . 'factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." By s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory Acts are to have effect as if "every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading, or unloading, therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery, shall be deemed to be the occupier of a factory."

The question is whether the accident in this case arose out of and in the course of an employment to which the Act applies. That depends on whether the deceased was employed on, in, or about a dock within the meaning of s. 7, sub-s. 2, of

C. A. 1898

WOODHAM v. ATLANTIC TRANSPORT COMPANY.

the Act, or, if not, whether he was employed on, in, or about machinery or plant coming within s. 23, sub-s. 1, of the Factory and Workshop Act, 1895.

It is contended firstly that the word "dock" as used in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, does not include a ship loading or unloading in a dock. A man employed in a ship in a dock is employed on, in, or about a ship, not on, in, or about a dock in the sense contemplated by the Act. The Act only applies to the land part of a dock. Sub-s. 3 of s. 7 tends to shew that this is the correct construction of the Act, for it would have been unnecessary upon the other construction.

Secondly, the deceased cannot be said to have been employed on, in, or about machinery or plant used in unloading the ship in the sense contemplated by the Act. The Act applies to the case of a workman employed in working machinery. The deceased was not employed in working the crane; nor did the accident arise from any defect in the condition or management of the crane or apparatus connected therewith. The Act contemplates the case of a workman who is working on or about machinery and is injured thereby. The mere fact that the workman is employed to work in proximity to machinery coming within the Act will not suffice to bring the case within the Act. It was an accident that the case of cartridges exploded while being placed in the basket. Suppose that it had exploded while standing on the deck, or while being carried from the baggage-room at a distance from the crane. If a workman in the position of the deceased had been injured by such an explosion he could not have claimed compensation under the Act.

Mallinson, for the respondent, was not called upon to argue.

A. L. SMITH L.J. I propose to decide this case upon the second point which was argued, which appears to me quite clear, without saying anything on the larger point, namely, whether a ship in a dock comes within the term "dock" as used in the Workmen's Compensation Act, 1897, s. 7, sub-s. 2. The appellants were using a quay, on which was a crane, which they were using for the purpose of unloading a ship belonging

to them. They employed the deceased in the operation of unloading from the ship by means of the crane certain cartridges in cases. While, in the course of this employment, he was engaged on board the ship in placing one of the cases in a basket which was attached to the crane, the case exploded and he was killed. The question is whether under those circumstances the case comes within the Workmen's Compensation Act, 1897. In order to answer that question it is necessary to read together s. 1, sub-s. 1, and s. 7, sub-ss. 1, 2, of that Act and s. 23, sub-s. 1, of the Factory and Workshop Act, 1895. Reading those enactments together, the provisions of the Act so far as material run thus: if personal injury is caused to a workman by an accident arising out of and in the course of employment on, in, or about, among other things, machinery or plant used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, the Act shall apply. Such being the effect of the different sections when pieced together, it is in my opinion impossible to say that the accident in this case did not arise out of and in the course of the employment of the deceased man on or about machinery or plant, namely, the crane, which was being used for the purpose of unloading the appellants' ship to the quay, and, that being so, the Act applies. I think this appeal must be dismissed.

RIGBY L.J. and COLLINS L.J. concurred.

Appeal dismissed.

Solicitors for appellants: *Holman, Birdwood & Co*
Solicitor for respondent: *William Mitchell.*

E. L.

1898
Oct. 26.

PARKER, APPELLANT *v.* ALDER, RESPONDENT.

Adulteration—Food (and Drugs)—Milk—Liability of innocent Vendor for Milk Adulterated in Transit—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

The respondent, a milk salesman, contracted to supply pure milk to an association. The milk was to be delivered to the association at a railway terminus in London. The respondent delivered the milk in a pure and unadulterated condition to the servants of the railway company at his local station, and the milk was adulterated without his knowledge or consent during the transit from the local station to the terminus:—

Held, that the respondent was liable to be convicted under s. 6 of the Sale of Food and Drugs Act, 1875.

CASE stated by a metropolitan magistrate.

The respondent was summoned by the appellant for having on January 1, 1898, at the Great Western Railway Station at Paddington, sold to the prejudice of the purchaser within the meaning of s. 6 of the Food and Drugs Act, 1875, as amended by s. 3 of the Food and Drugs Act, 1875, Amendment Act, 1879, an article of food, to wit, milk, which was not of the nature, substance, and quality demanded by the purchaser. (1)

It appeared that the appellant, who was the inspector of nuisances for the parish of Paddington in the county of London, on January 1, 1898, took a sample of milk from a churn standing at Paddington Railway Station, which sample, having

(1) By the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6, "No person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds."

By the Sale of Food and Drugs Act, 1875, Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3, "Any .... inspector of nuisances .... may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such .... inspector .... if he suspects the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the same shall be analysed and proceedings shall be taken and penalties on conviction be enforced in like manner in all respects as if such .... inspector .... had purchased the same from the seller or consignor ...."

been duly analysed, was found to contain 9 per cent. of added water. The churn from which the sample was procured by the appellant was consigned by the respondent, who was a dairy farmer carrying on business at Wantage in Berkshire, to the Metropolitan and Suburban Milk Supply Association, Limited, in pursuance of a contract made between the respondent and the association on March 20, 1897, whereby the respondent agreed to sell, and the association agreed to purchase, pure unskimmed new milk in specified quantities and at specified prices, to be delivered carriage paid, in churns, morning and evening, from March 26, 1897, to March 25, 1898, at Paddington or any other railway station served by the Great Western Railway near London, in such condition as to keep good and sweet a reasonable time after delivery, in accordance with the regulations specified in the contract.

The contract provided (inter alia) as follows:—

"Only milk sent in accordance with the terms of this contract and the quantity actually received will be paid for. The association not to be accountable for loss in transit.

"That all milk be sent perfectly pure and wholesome, and of such good quality as to contain, by weight ascertained by analysis, not less than 12·5 per cent. of total solid matters, of which at least 3·5 per cent. shall be butter fat.

"The seller undertakes to affix a warranty label (supplied by the association), duly signed and filled up by him or his authorized representative, to each consignment of milk made under this contract.

"Lastly, the said Frederick Alder hereby warrants each and every consignment of milk, delivered or to be delivered under this contract, to be pure and unadulterated milk, and with all its cream, as from the cows."

It appeared that the unvarying course of business between the parties to the contract was that the respondent delivered the daily supplies of milk in churns fastened up in the usual way, and labelled and consigned to the association, to the Great Western Railway Company at Challow, the nearest Great Western station to Wantage, for transmission to the association at Paddington, and that the association themselves

1898

PARKER v. ALDER.

took the churns away from Paddington. The respondent did not, and practically could not, exercise any control over the churns between their delivery to the railway company at Challow and their subsequent delivery to the association at Paddington.

The churn from which the sample was taken was, pursuant to the contract and to this course of business, given by the respondent into the charge of the Great Western Railway Company at Challow Railway Station for conveyance by the company to Paddington. The magistrate found as a fact that when the churn was handed over to the railway company at Challow the milk contained therein was pure, and in all respects in accordance with the requirements of the contract; and that the water subsequently found by the analysis to have been added thereto was so added unlawfully by some person stranger to the respondent, during the transit from Challow to Paddington, without the knowledge or authority of, and without any default or negligence on the part of, the respondent, or any servant of the respondent, or any person employed by him in his general business of a dealer in milk.

The magistrate held that the place of the delivery of the milk to the association, whether under the contract or for the purposes of the Acts, was Paddington Station, but that as between the respondent and the association, the milk having been delivered to an agreed carrier for transmission to the association, had been, with the assent of the latter, unconditionally appropriated to the association at Challow, where, therefore, the property in it passed to the association, and the sale (as distinguished from delivery) took place. On this ground he considered that, as between the respondent and the association, no sale within s. 6 of the Food and Drugs Act, 1875, took place at Paddington. He further held that, even if the sale as between the respondent and the association were held to have taken place at Paddington, the respondent was in law liable only for the acts and defaults of himself and his servants, and that such liability was negatived by the facts found.

He therefore dismissed the summons.

1898

PARKER v. ALDER.

Cunningham Glen, for the appellant. The magistrate was wrong. It is clear from the contract that the milk did not become the property of the association until it was delivered to them at Paddington Station. That being so, there was a sale of this milk to the appellant at Paddington which was to the prejudice of the purchaser. That is the combined effect of s. 6 of the Act of 1875 and s. 3 of the Act of 1879. The only remaining question is whether, assuming that the respondent acted honestly, he is liable. If the article sold is in fact adulterated, it is immaterial that the vendor had no mens rea. In *Brown* v. *Foot* (1) it was decided that if milk is adulterated by a milkseller's servants without their master's connivance, and even against his express orders, he is, nevertheless, liable under the Acts. The language used by the judges in that case goes far enough to cover the present case, where the adulteration was the act, as the magistrate finds, not of the respondent's servants, but of strangers to him. It is sufficient that the milk was delivered in an adulterated state to the purchaser, and it matters not by whose act that adulteration was caused.

The respondent did not appear.

LORD RUSSELL of KILLOWEN C.J. This is an appeal from the decision of a metropolitan police magistrate, by which he declined to convict the respondent of the offence with which he was charged—namely, that he had committed an offence against s. 6 of the Sale of Food and Drugs Act, 1875, as amended by s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879. In my judgment, the learned magistrate ought to have convicted the respondent, and I think that he was wrong in coming to the conclusion that no offence had been committed by him.

The respondent had entered into a contract with an association for the supply to them of considerable quantities of milk, which was to be pure, unskimmed milk, and was to be delivered either at Paddington or at any other railway station served by the Great Western Railway near London; and by the first clause of the contract only milk sent in accordance with the

(1) (1892) 66 L. T. (N.S.) 649.

1898

PARKER v. ALDER.

Lord Russell C.J.

terms of the contract and the quantity actually received were to be paid for, and the association were not to be accountable for loss in transit; and, lastly, the contract provided that the respondent "warrants each and every consigment of milk delivered or to be delivered under this contract to be pure and unadulterated milk, and with all its cream as from the cows."

I say all this because of the erroneous view which was, as it seems to me, taken by the magistrate. It is clear, on the construction of the contract, that the risk of the association only began when the property was delivered to them at Paddington. Up to that time the risk was that of the respondent, the vendor. The liability of the vendor did not cease when he put the milk on the train at Challow Station consigned to Paddington.

I understand that the magistrate came to the conclusion that Paddington was the place of delivery, but that he thought, as between the respondent and the association, that the milk having been delivered to a specified carrier for delivery with the assent of the association, the property passed to the association, and the sale took place, not at Paddington, but at Challow Station.

In my opinion the property in the milk did not pass to the association until it reached Paddington.

Under those circumstances, the appellant, who is the inspector of nuisances for the parish of Paddington, took a sample of the milk on January 1, 1898, from a churn standing in Paddington Railway Station, and that sample, on being duly analyzed, was found to be adulterated by 9 per cent. of added water. An offence, therefore, against the Act had been committed. The learned magistrate on the facts came to the conclusion that the respondent had honestly delivered pure and unadulterated milk to the servants of the railway company at Challow, and that he was no party either directly or indirectly to the adulteration. That adulteration, he finds, must have taken place in the course of the transit of the milk from Challow to Paddington. The question for us is whether on those facts any offence has been committed by the respondent. That question depends on the proper construction of two sections—namely, s. 6 of the Sale of Food and Drugs Act, 1875, and s. 3 of the Sale of Food and

Drugs Act Amendment Act, 1879. It is important to notice in the Act of 1875 that s. 5 enables persons charged with certain offences under the Act to meet the accusation by shewing that they did not know, and could not with reasonable diligence have ascertained, that the article was adulterated. That has to be borne in mind in construing s. 6, which provides that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser. By s. 3 of the Act of 1879 any inspector of nuisances (among other persons) may procure at the place of delivery any sample of any milk in the course of delivery to the purchaser or consignee, in pursuance of any contract for the sale to such purchaser or consignee of such milk, and may submit the same to be analysed, and take proceedings as if he had purchased the same from the seller or consignor.

Now, assuming that the respondent was entirely innocent morally, and had no means of protecting himself from the adulteration of this milk in the course of transit, has he committed an offence against the Acts? I think that he has. When the scope and object of these Acts are considered, it will appear that if he were to be relieved from responsibility a wide door would be opened for evading the beneficial provisions of this legislation. It has been decided in *Brown* v. *Foot* (1) in the clearest manner that an innocent vendor of milk is undoubtedly liable for the unauthorized act of his servant in adulterating it. It becomes, therefore, at once apparent that there is really no material difference between this case and that, because a vendor is no more able to prevent the adulteration by a dishonest servant than he is to prevent adulteration by strangers such as the servants of the railway company. This is one of the class of cases in which the Legislature has, in effect, determined that mens rea is not necessary to constitute the offence.

I therefore am of opinion that the respondent had committed an offence against the Acts. Assuming that the magistrate was right in holding that he had acted innocently

(1) 66 L. T. (N.S.) 649.

1898

PARKER v. ALDER.

Lord Russell C.J

and in good faith, it is obviously a case in which he ought not to have been prosecuted, and if convicted the fine ought merely to be a nominal one, or the magistrate may act under s. 16 of the Summary Jurisdiction Act of 1879; but we cannot be deterred by the apparent hardship of the particular case from giving full effect to the intention of the Legislature.

WILLS J. I am of the same opinion. I was myself a party to the decision in *Brown* v. *Foot* (1), and I believe that decision to be sound law. It certainly has frequently been acted upon. There is, as it seems to me, no material distinction between the case of adulteration by a servant without the authority, and against the express orders, of his master, and adulteration by the fraudulent act of a stranger. The legislation on the subject was intended to be drastic, and the offence was created quite independently of the moral character of the act. I feel no doubt that Paddington was the place of delivery, and that the railway company were acting in carrying the milk as the agents of the respondent. That really disposes of the case. I will only add that I certainly agree with my Lord as to what the result of such a prosecution ought to be; and I may point out that, by s. 16 of the Summary Jurisdiction Act, 1879, the magistrate has power to discharge the accused without punishment if he considers the offence to be in the particular case of so trifling a nature that it is inexpedient to inflict any punishment. There is, therefore, ample power to exonerate the respondent and relieve him from any hardship.

Case remitted to magistrate to convict.

Solicitor for appellant: *John H. Hortin.*

(1) 66 L. T. (N.S.) 649.

A. P. P. K.

THE JOINT COMMITTEE OF THE RIVER RIBBLE *v.* HALLIWELL.
THE SAME *v.* SHORROCK.

1898
Oct. 27.

Nuisance—Remedies—Pollution—Stream—"Putrid Solid Matter"—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.

Sect. 2 of the Rivers Pollution Prevention Act, 1876, prohibits the putting, or causing or knowingly permitting to be put, "any putrid solid matter" into any stream so as to pollute its waters, and by s. 20 "'solid matter' shall not include particles of matter in suspension in water." By s. 17 the Act "shall not apply to or affect the lawful exercise of any right of impounding or diverting water."

The defendant owned weaving sheds, worked by steam-power, on the bank of a stream, and he had for many years prior to the passing of the Act lawfully exercised the right of impounding and diverting water from the stream for the purposes of his business. Such water was diverted from the stream through a goit and impounded in the defendant's reservoir, and contained substances discharged into the stream from paper manufactories, not belonging to the defendant, higher up the river. Whilst the water was so impounded those substances sank to the bottom and became putrescent in the form of sludge. Part of the water, when thus cleared, was taken from the reservoir and used for condensing purposes. Once a week the reservoir was cleaned by opening sluice-gates into the river and allowing the water to flow through the reservoir and out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water as it went into the stream through the sluice-gates contained 97·6 per cent. of water and 2·4 per cent. of solid matter:—

Held, that the solid matter, when it entered the stream from the reservoir, was "solid matter in suspension in water" within s. 20, and therefore not "solid matter" within the meaning of s. 2 of the Act:

Held also that, assuming that what was put into the stream was "solid matter" within the meaning of s. 2, the defendant was protected by s. 17, and therefore not liable to be proceeded against under the Act.

APPEAL from the decisions, in two cases, of the judge of the Blackburn County Court.

In each of the actions the plaintiffs alleged that the defendant did, on November 6, 1897, put or cause to be put, or to fall or be carried, into the river Darwen, certain putrid solid matter, so as to interfere with the due flow of and to pollute such river contrary to the provisions of Part I., s. 2, of the Rivers Pollution

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Prevention Act, 1876 (1); and the plaintiffs claimed, against the defendant in each action, an order under s. 10 requiring him to abstain from the commission of any further offence against the Act, and an order requiring him to perform his duty in the premises in manner to be specified in such last-mentioned order, and with such conditions and directions for carrying it into effect as to the Court should seem meet.

The plaintiffs, the Joint Committee of the River Ribble, are constituted an authority to take proceedings under the Rivers Pollution Prevention Act, 1876, by the Local Government Board's Provisional Orders Confirmation (No. 10) Act, 1891 (54 & 55 Vict. c. lxxi.).

The material facts proved in evidence before the county court judge or admitted may be gathered from the head-note to this report, and are fully stated in the judgment of Lord Russell of Killowen C.J. (2).

The facts in each case were substantially the same.

The county court judge gave judgment for the defendant in each case, on the grounds that what was put or permitted to put into the stream by the defendants was not "putrid solid matter" within the meaning of s. 2 of the Rivers Pollution Prevention Act, 1876, and that they were protected by s. 17.

The plaintiffs appealed. The appeals were heard together in the Divisional Court.

(1) The Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 2: "Every person who puts or causes to be put or to fall or knowingly permits to be put or to fall or to be carried into any stream, so as . . . . to interfere with its due flow, or to pollute its waters, the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or any putrid solid matter, shall be deemed to have committed an offence against this Act."

Sect. 17: "This Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water."

Sect. 20: "In this Act if, not inconsistent with the context, ... 'solid matter' shall not include particles of matter in suspension in water."

By s. 10 offences under the Act may be restrained by the order of the county court having jurisdiction in the place where the offence was committed, and by s. 11 an appeal from the decision of the county court in point of law or on the merits is given to the High Court of Justice.

(2) Post, p. 29.

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Cripps, Q.C. (*F. Mellor* with him), for the plaintiffs. On the evidence the matter complained of became "putrid solid matter" when it settled in the defendants' reservoirs, and the defendants in putting it or permitting it to be put into the stream by opening their sluice-gates committed an offence against s. 2. It is immaterial that the percentage of solid matter was small. Sect. 17 does not protect the defendants if they did put putrid solid matter into the stream. That section was probably inserted "ex majori cautela," and at any rate only protects the impounder in respect of the condition of the water whilst it is impounded.

Danckwerts, for the defendant Halliwell, and *J. K. Bradbury* for the defendant Shorrock. The defendants do nothing more than exercise the ordinary right of riparian owners to impound water and return it to the stream. The evidence shews that the putrescence is caused by the vegetable matter put into the river higher up. When the water is returned to the stream from the reservoir, it contains, not solid matter, but solid matter in suspension. There is, therefore, no offence under s. 2. The Act draws a marked distinction between pollution by solid and pollution by liquid matter. No question of pollution by liquid matter arises here. The point at which the matter goes into the stream from the reservoir is the crucial point, and the evidence shews that what was put in at that point was water mixed with less than 3 per cent. of solid matter.

Sect. 17 applies to protect the defendants. The saving of riparian owners' rights in that section must have reference to s. 2. The putrescence of the matter is a necessary consequence of impounding the water for the purposes of the defendants' businesses, and s. 17 was introduced into the Act with the object of preserving the rights of riparian owners in such cases.

Cripps, Q.C., replied.

LORD RUSSELL of KILLOWEN C.J. This case is an important one. It is important to the public, because, of course, it is a matter of public interest and advantage that all the steps which can properly be taken should be taken, if not to render pure, at all events to prevent a continuing pollution of streams. It is

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Lord Russell C.J.

important to manufacturers, because a certain view of this Act, which was sought to be enforced, might have a very injurious effect upon manufactures which are carried on for the benefit of the public and of the proprietors of manufactories along many rivers throughout the country.

The questions in the case are two: Was the evidence such as to make it the duty of the county court judge to find that an offence had been committed under s. 2 of the Rivers Pollution Prevention Act, 1876? Or, if the offence be primâ facie made out under s. 2, what is the effect of that section taken in conjunction with s. 17? I propose first to refer to some provisions of the Act, and then to consider the facts as they appear in the evidence. The scope and object of the Act are to prevent the further pollution of rivers, and to improve their condition; but the Legislature has taken great care, as is shewn in various provisions of the Act, to do nothing avoidable to interfere with the manufactures as heretofore carried on. Those two objects are made apparent throughout the Act. Sect. 2 provides: [His Lordship read s. 2.]

Now in the present case it is admitted that the only words of that section within which the respondents can be brought are the concluding words with regard to putting any "putrid solid matter" into the river; and the first question here is, Have the defendants put, or permitted to be put, into the river any putrid solid matter? I agree that it does not matter whether they actually put the putrid solid matter in, if they knowingly permitted it to be put in. It must be shewn to be putrid; it must be shewn to be solid; and it must be shewn to be putrid and solid, as I conceive, when it is put into the river; because if at the time it is put into the river it is not putrid solid matter, then, in my judgment, they do not commit an offence against the Act. In that connection, of course, has to be read the definition of solid matter given in s. 20: "Solid matter shall not include particles of matter in suspension in water"—in other words, solid matter shall not include that which, I suppose, strictly and scientifically, is still solid matter, but solid matter in suspension.

Part II. of the Act deals with the prohibition as to drainage

of sewers into streams. Part III. deals with the law as to manufacturing and mining pollutions. I agree, as at present advised, with the appellants' counsel, that the case could not have been brought within s. 4, because the effluent which is here complained of as being put into the river is effluent let out of the larger impounding reservoir from which, as I gather, after the water has been allowed to settle, the clearer water is conducted into another reservoir, and in that reservoir used for the purpose of condensing, and the water, having been so used for condensing, is delivered again into the river lower down by some other conduit. No complaint is made with regard to that water. I think, therefore, that the appellants' counsel is right in saying, in answer to the contention urged on behalf of the respondent Shorrock, that the case could not have been brought within that section. It is important, however, as helping us to get at the scope and object of this Act, to observe the care which the Legislature has taken to protect, so far as it can, on the one hand, the purity of the stream, and on the other, the manufactures carried on on its banks. The short effect of the provisions under that head (s. 4) is that a manufacturer who does the thing which causes pollution, may yet be relieved of the imputation of having committed an offence against the Act, if he shews to the satisfaction of the Court that he has done the best that was practicable to render harmless the noxious or polluting liquid which in fact he caused to flow or be carried into the stream. Further, there is the important provision of s. 6, which prevents proceedings being taken except by a sanitary authority and with the sanction of the Local Government Board; and, finally, the sanction of the board is not to be given unless they are satisfied after due inquiry that means for rendering harmless the poisonous, noxious, and polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry. Then follow a number of clauses as to the mode of procedure, which I need not consider in detail.

Then comes s. 17, which, in my judgment, has a very

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Lord Russell C.J.

important bearing on the question in one of its aspects. Sect. 17 says: "This Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water."

I now proceed to consider the facts of the case in relation to those provisions of the Act of Parliament to which I have referred; and in doing this I do not propose to make—as the appellants' counsel have not made—any distinction between the two cases. I will deal with them as if they were one. Any incidental differences there are between them are differences which do not affect my judgment.

In Halliwell's case he has weaving sheds worked by steam-power, and he has enjoyed for a period of time, which gives him what, I presume, is now an indefeasible right, the right to divert higher up the river Darwen water from the stream by means of a goit. Higher still up the stream, as the evidence shews and as anybody who knows Lancashire and the river Darwen must be aware, there are a considerable number of manufactories, some of them at points where the stream is very considerable and the flow very rapid, of paper in which esparto grass is very largely used, and undoubtedly the owners of these manufactories do, as they have done for many years, discharge refuse of vegetable matter from their works into the river; and when the respondent Halliwell, in the exercise of his rights to divert the water from the river, opens his goit gate, it necessarily follows by the natural action of the stream itself that a portion of the vegetable and other matter cast into the stream higher up is brought down into that goit, and by means of that goit impounded in the large reservoir to which I have referred. It is obvious that such impounding is necessary for the purposes of the respondent's business, and it would be idle to let the stream come into the goit and flow through into the river again. It is said that, if that had been done, there would not have been the putrescent matter which ultimately sprang from the presence of these vegetable and other substances in the river.

It necessarily follows that the respondent must impound the water which comes through the goit in his larger reservoir—

the main reason being that he wants to get the water in a purer state for the purpose of condensing. It is, therefore, allowed to settle in the larger reservoir, and is then let into another reservoir by a conduit for the purposes of condensation. Further, it is obviously necessary to clean this larger reservoir from time to time in order to prevent the silting up of a great deal of matter which would occupy space required for the purposes of his water supply, and to prevent the water becoming, as it probably would become to a large extent, of a character unfit for condensing purposes. The respondent accordingly does clean out the larger reservoir at regular intervals—apparently on Saturdays after the engines have ceased working. He opens three sluices which open into the river Darwen, and allows the water to flow through the reservoir and out into the stream. That is all that he does. It is not suggested that he makes any contribution to any solid or other matter in the reservoir; all that he lets into his reservoir is what the stream brings down, and all that he lets out is what the stream has brought down. The evidence shews that in Halliwell's case some of his men, when the effluent was proceeding from the larger reservoir and carrying a large quantity of solid matter with it, did something to assist the passage of the solid matter by using spades or shovels, but that that did not cause a greater quantity to go down than if they had left it merely to the natural action of the stream itself. The only effect was, as the county court judge has found, to accelerate its passage out of the reservoir.

Now, in what condition was that effluent at the moment it left the reservoir and was sent into the stream? To satisfy the language of the Act it must be putrid matter of a nature to pollute the stream, and it must be solid putrid matter; and, bearing in mind the definition of "solid matter," it ceases to be solid matter within the Act, although there are particles and even many particles of that which is, I repeat, scientifically still solid matter, when it is or becomes solid matter in suspension. Without going minutely into the figures as we were invited to do I find, and for the present purpose am content to take it, that a sample of the effluent taken by the appellants

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Lord Russell C.J.

as it was going into the stream contained 97·6 per cent. of water and 2·4 per cent. of solid. Now I ask myself, can that be said to be solid matter within the meaning of the Act? The Act makes an emphatic difference between solid and liquid matter; and I think that, judged by the common sense and ordinary meaning which people put upon language of this kind, and I see no reason why any other meaning should be put upon it, no person could be found to describe a body, of which 97·6 per cent. was water and the remaining 2·4 per cent. solid, as being solid matter. He would say it was effluent water carrying along with it, and in suspense with it, 2·4 per cent. of solid matter. If that be so, what was carried was solid matter in suspension, and does not come within the provisions of this Act.

It will be observed that this is largely a question of fact, the question being, Is what was carried into the stream, or is it not, solid matter? The county court judge has arrived at the conclusion of fact that it was not solid matter; I should arrive at the same conclusion. I certainly cannot say that in point of fact he was wrong in arriving at the conclusion that this was not, when discharged into the river, putrid solid matter.

I do not stop to consider what I conceive to be the hardship of the attempt to fix the respondent with this responsibility; but he is not the cause of the mischief. As I have said, he merely deals with the water which comes in by his goit in the condition in which the flow of the river with all its impurities brings it to him. That is all he does; and certainly this Court cannot uphold any proceedings by which it is sought to punish him, if he has not offended against the law, merely because the authorities have for some reason or other failed to bring home responsibility for this pollution to those who really cause it—namely, the manufacturers higher up the stream.

So much as regards the first point. With regard to s. 17, even if what went into the stream from the larger reservoir were solid matter, I should still be of opinion that, on the facts of this case, the respondent would not have committed an

offence against the Act, because he would come within the protection of s. 17. That section provides that the Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water. Of course, when it speaks of lawful rights it speaks of lawful rights as they existed at the date when the Act was passed—namely, 1876. It is common ground that at that date the respondent Halliwell had the lawful right—I invert the order in which these words appear in the section—of diverting and had also, having diverted, the lawful right of impounding water. He had the lawful right of impounding water for the purposes of his manufacture. He could only impound it as it came to him by the natural flow of the stream with the artificial impurities added to it by the manufactories above; and the case, as put by the appellants and established by the evidence, is that it was a natural consequence of his impounding that the matter in the impounded water should become putrescent by the very fact of its being impounded and kept from following in its natural flow. But he had a right to impound it, and it seems to me very difficult to see in principle or reason how he is to be made responsible for the necessary consequences of the reasonable exercise of the right which by the statute is saved to him. The things required to constitute the offence are, that the matter should be putrid, that the matter should be solid, and that that matter, putrid and solid, should be let into the stream. It seems to me clear that this Act preserved to him the right to divert and impound, and has held him harmless for any consequence which legitimately and necessarily followed the reasonable exercise of that right. It is obvious that, so far as putridity is concerned, he could do nothing, consistently with the exercise of his right to use the water in a reasonable and adequate way for the purposes of his business, which would prevent the putridity being effected by reason of the detention of the water, with this matter in it, for those purposes.

As to the solid matter, assuming that my view of the facts as applicable to s. 2 is not correct, and assuming that, in fact, the respondent does put solid matter into the stream, what is it that he does? Having got the water by means of his goit impounded

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Lord Russell C.J.

in the reservoir, it is necessary for him at the week end to open his sluice-gates for the purpose of cleansing his reservoir. Is that, or is it not, a necessary incident to his rights to divert and impound—rights which he could not beneficially enjoy or exercise unless he also, as the evidence shews, was permitted from time to time to open his sluice-gates for the purpose of cleansing out his reservoir? Again it seems to me that s. 17, which says that the Act is not to apply to or to affect the lawful exercise of the right to impound or divert, means in effect that any act, properly and reasonably done, in the exercise of those rights, or consequential upon the reasonable exercise of those rights, shall not be an offence against the Act.

Upon these two grounds I arrive at the conclusion that the learned county court judge was right, and that his judgment ought to stand.

WILLS J. I have come to the same conclusion; and the only matter upon which I desire to say anything is the second question, namely, the applicability of s. 17 to the facts of this case. It seems to me that s. 17 intended to preserve to a person, who had already acquired by lapse of time and user a right as riparian owner to impound and divert the water of the stream, the right to continue so to deal with it. It seems to me that to speak of the right of impounding apart from the right to return the water taken out of the stream to the stream, is a contradiction in terms. You cannot deal with the impounded water for any beneficial purpose unless you have a right to restore it to the stream; and if you cannot restore it to the stream in such a way as to keep the impounding reservoir intact as to its dimensions, the result will be that in process of time your impounding reservoir will cease to be one at all. It will be filled up with silt and become useless. I think that the right to impound and divert necessarily carries with it the right to deal with the impounded water in the way of returning it to the river in the manner which has hitherto been enjoyed for the requisite period. It appears that these respondents had done nothing more than they have been in the habit of doing for a great number of years before the Act was passed; and,

1898

RIVER RIBBLE JOINT COMMITTEE v. HALLIWELL. THE SAME v. SHORROCK.

Wills J.

therefore, it seems to me that they had then obtained the rights which they are now exercising, and that they are brought within the saving provisions of s. 17. Just as in the group of sections commencing with s. 4 the rights of persons, who have hitherto discharged polluting water into the stream, are preserved in case they take the best steps to render the water as harmless as they can, so in this section the rights already acquired are vested in the persons enjoying them—the rights of impounding and diverting—and all that those rights carry with them appear to me to have been preserved.

I, therefore, agree that the second question, as well as the first, should be answered in favour of the respondents.

Appeal dismissed. Leave to appeal.

Solicitors for plaintiffs: *Ridsdale & Son, for F. C. Hulton Preston.*

Solicitors for defendant Halliwell: *Halliwell & Halliwell, Darwen.*

Solicitors for defendant Shorrock: *Pritchard & Englefield, for C. Costeker, Darwen.*

W. A.

1898
Nov. 1, 2.

[IN THE COMMERCIAL COURT.]

PURVES *v.* STRAITS OF DOVER STEAMSHIP COMPANY.

Ship—Seaman—Termination of Service Abroad—"Passage Home"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

When the service of a seaman belonging to a British ship terminates at a foreign port, and the master elects to "provide him with a passage home," under s. 186, sub-s. 2 (*c*), of the Merchant Shipping Act, 1894, the master is bound to provide him with a passage to the port in the United Kingdom at which he was shipped.

Edwards v. *Steel*, [1897] 1 Q. B. 712; [1897] 2 Q. B. 327, considered.

COMMERCIAL CAUSE tried before Mathew J.

The action was brought by the plaintiff, a sea-going fireman, to recover from the defendants, owners of the steamship *Straits of Dover*, a sum of 1*l.* 5*s.* 3*d.*, which he claimed, under s. 186 of the Merchant Shipping Act, 1894 (1), as being the cost of his maintenance and passage home from Antwerp to Newport.

The facts were agreed as follows:—

On January 19, 1898, the plaintiff shipped at Newport, Monmouth, on board the SS. *Straits of Dover* in the capacity of

(1) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 186:—

"(1.) In the following cases; namely,—

"(*b*) Where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions, the master shall give to that seaman or apprentice a certificate of discharge in a form approved by the Board of Trade, and in the case of any certificated officer whose certificate he has retained shall return such certificate to him.

"(2.) The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either—

"(*a*) Provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or

"(*b*) furnish the means of sending him back to some such port, or

"(*c*) provide him with a passage home, or

"(*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home."

fireman, under articles of agreement of the same date, wherein the plaintiff's birthplace was described as Everlady, Haddington; his port of engagement address as 4, Windmill Street, Newport; and his home address as 90, Roseley Drive, Denniston, Glasgow; and the intended voyage was described as being "Newport to Rio de Janeiro and for any ports or places within the limits of 75 degrees north and 60 degrees south latitude, the maximum time to be one year's trading in any rotation, and to end in the United Kingdom or Continent of Europe between the Elbe and Brest (inclusive) at master's option."

The plaintiff duly served on board the steamship, which proceeded on her contemplated voyage, and that voyage finally terminated on May 9th, 1898, at Antwerp. Antwerp is a port on the Continent of Europe between the Elbe and Brest.

The master of the steamship thereupon paid off the crew, and, in addition to their wages, tendered, in manner provided by the Merchant Shipping Act, 1894, to each member of the crew, the sum of 12*s.* 6*d.* for the purpose of providing him with a passage from Antwerp to Harwich (a port in the United Kingdom), together with maintenance upon the said passage. All the members of the crew with the exception of the plaintiff accepted the provision so tendered; but the plaintiff refused to accept either his wages, or passage and maintenance money, unless he was paid in respect of the latter sufficient to enable him to proceed to Newport, and he claimed in respect of such passage-money and maintenance the sum of 1*l.* 5*s.* 3*d.*, which the master refused to pay.

The wages due to the plaintiff were remitted in the ordinary course to the Mercantile Marine Office at Newport, where they were subsequently received by him.

The sum of 1*l.* 5*s.* 3*d.* claimed by the plaintiff was a proper and sufficient sum to provide him with passage-money and maintenance from Antwerp to Newport. The sum of 12*s.* 6*d.* was a proper and sufficient sum to provide him with passage-money and maintenance from Antwerp to Harwich only.

J. D. A. Johnson, for the plaintiff.

Joseph Walton, Q.C., and *Noad*, for the defendants.

1898

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

The arguments sufficiently appear from the judgment of Mathew J.

Cur. adv. vult.

Nov. 2. MATHEW J. This was an action brought to recover money alleged to be due to the plaintiff under s. 186 of the Merchant Shipping Act, 1894. It is an important case because it relates to the rights of British seamen who happen to be discharged from a British ship at a foreign port. The case is a test case, presented upon an agreed statement of facts; and it is intended to raise the question of the true construction of the section to which I have referred.

The plaintiff shipped on board the vessel of the defendants at Newport in the capacity of a fireman. The voyage contemplated was a long voyage out to Rio, and back to any port within the limits specified in the shipping articles. Among those ports was Antwerp. The vessel performed her voyage, arrived at Antwerp, and the crew were there paid off. The plaintiff, having been paid his wages, then demanded that provision should be made, under the Merchant Shipping Act, for sending him home, and he required that he should be sent home to Newport. The master, on behalf of the owners, refused to comply with the seaman's request, alleging that under the Act he was entitled to select the port to which the seaman was to be sent, and to send him to any home port. Naturally enough, under the circumstances, the master selected the port which was most convenient to him, and would cost least, to which to send the seaman, namely, the port of Harwich. The question is whether the master was right or the seaman with reference to the meaning of the section in question.

The Merchant Shipping Act, 1894, contains what I may call a chapter, consisting of several sections, relating to derelict seamen, to use a compendious expression. The first of these sections (s. 184) relates to strangers brought in any ship, British or foreign, and left without any means of returning to their native country or to the country in which they were shipped, and imposes a penalty upon the owner or master or consignee

of the ship unless he can shew that he has afforded the stranger the means of returning to his native country, or to the country in which he was shipped. The section then goes on to provide (sub-s. 2) that "The Court inflicting the fine may order the whole or any part of the fine to be applied towards the relief or sending home of the person left." Therefore, in that section, under the description "home," there comes "the country in which the seaman was shipped." The next (s. 185) relates to lascars, and provides for their being taken charge of and sent "home" by the Secretary of State. Now, what is the meaning of "home"? The section says only that the Secretary of State may "send home or otherwise provide for" such lascars. Can it be supposed that it was intended that a lascar should be sent to any port, say, in British India? That is the lascar's country, and he might be sent hundreds of miles away from where he was shipped, and to a part of the country with which he had no connection. I do not suppose for a moment that, in the exercise of the powers conferred upon the Secretary of State by s. 185, there would be any doubt that the man's right was to receive the means of going back to the port where he had been shipped. That phrase, "send home," receives some little light from the provisions of sub-s. 2 of s. 185, because there is there a provision that the Secretary of State shall be informed of the port abroad from which the ship sailed, and the port in the United Kingdom at which the ship arrived when the lascar was so brought to the United Kingdom, and the time of the arrival. For what purpose has the Secretary of State to be informed of the port abroad from which the ship sailed? Apparently for the purpose of determining what the "home" is to which the man should be sent. Now, the provisions made under these sections apply to a totally different class from that to which the plaintiff belongs. Then follow ss. 186–189, relating to seamen left in a foreign port on being discharged from a British ship. The provisions of s. 186, sub-s. 1 (*b*), are: "Where the service of any seaman or apprentice belonging to any British ship terminates at any port out of Her Majesty's dominions, the master shall give to that seaman or apprentice a certificate of discharge in

1898

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

Mathew J.

a form approved by the Board of Trade"; and sub-s. 2 provides that "The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman." Under that provision, therefore, the seaman is entitled to demand that he shall be sent back to the port at which he was originally shipped, or in the alternative to a port selected by him to which the owner is willing to send him. The next provision, sub-s. 2 (*b*), is: "or furnish the means of sending him back to some such port." Again, that secures to the seaman the right to be sent to the port at which he was originally shipped, because it is obvious that "some such port," in that clause, means the ports indicated in the previous clause. Then comes the further alternative, which has given rise to the dispute in this case. Sub-s. 2 (*c*) says: "provide him with a passage home"; that is the phrase which is there adopted. What is the meaning of that clause? It is said for the seaman that he is entitled to have something equivalent to what would be provided for him under the two earlier clauses; and under those clauses he was protected to this extent—that he might demand to be sent to the port where he was originally shipped. This is a perfectly reasonable interpretation. It is said on the part of the owner that this interpretation is unreasonable. It is said that the protection which was secured to the seaman by the two earlier clauses—(*a*) and (*b*)—is lost under clause (*c*), because under that clause it is for the owner or master to say where the seaman shall be sent. In the present case the master exercised that right, and refused to send the seaman back to the port at which he was shipped, namely, Newport, and insisted on sending him to Harwich. The inconvenience of such an interpretation is manifest. A man shipped in Scotland might be sent to Limerick, or a man shipped in Wales might be sent to the Thames; and his last position might be much worse than his first. He might be further off then from where he wanted to go, which presumably would be the place

where he was shipped, than if he was left derelict in a foreign port. In my opinion the reasonable interpretation of the section is the one which the seaman contends should be adopted; and the obvious hardship resulting from any other interpretation makes it impossible to accept the owner's view.

That is my view; but I ought to say that there has been a very great difference of opinion with reference to the construction of this clause. In *Edwards* v. *Steel* (1) Mr. Justice Collins, although it was not necessary for his decision, took a different view of the matter; and when that case came before the Court of Appeal, the Court, without deciding the question, intimated that they did not agree with the Court below. (2) Their Lordships were struck with the extreme inconvenience to seamen which would be caused if the interpretation of the owner was accepted. The question was not fully discussed in the Court of Appeal.

In the course of the discussion in the case before me a further difficulty presented itself, namely, as to what was to happen in the case of a man shipped in Canada, or Australia, or British India, and discharged from a British ship in a foreign port. Mr. Walton for the shipowner says that he is to be sent back to any port in, or any part of, the Queen's dominions to which he belonged, and that that is the meaning of "providing him with a passage home" in this clause. The violence done to the language of the Act is obvious. There is no such provision in the Act; but Mr. Walton says that the meaning of s. 186 can be ascertained by looking at a later section—s. 191. Now s. 191 and the following section provide for another class of derelict seamen. They are distressed seamen left without the means of returning home. Sect. 190 provides that "The Board of Trade may make regulations with reference to the relief, maintenance, and sending home of seamen and apprentices found in distress abroad, and may by those regulations (in this Act referred to as The Distressed Seamen Regulations) make such conditions as they think fit with regard to that relief, maintenance, and sending home" of such persons. My attention has not been called to any regulations which

(1) [1897] 1 Q. B. 712. (2) [1897] 2 Q. B. 327.

1898

PURVES v. STRAITS OF DOVER STEAMSHIP COMPANY.

Mathew J.

have been made which throw any light on this matter. Then s. 191, sub-s. 2, provides: "For the purpose of providing a distressed seaman with a passage home, the authority shall put him on board a British ship bound either to the United Kingdom or to the British possession to which the seaman belongs." It is contended by counsel for the defendants that this shews what "home" means in this Act, and that this is the meaning of the word "home" in the earlier section. But ss. 190, 191 are not in pari materiâ with the preceding sections, and the distinction is obvious. Under the later sections the object appears to be to bring a distressed seaman back to the United Kingdom, or to his own country, so as to afford him the protection of the laws for the relief of destitute persons; and I can well understand the Legislature saying that his port of shipment has nothing to do with that question. It would be quite sufficient to protect him if he is sent back to his own country and left to the laws of his own country.

It appears to me that these sections afford no certain light as to the meaning of the earlier sections, and that the interpretation which I have put upon the earlier sections is a reasonable and convenient one, and not fettered in the least by anything contained in ss. 190–194. Under these circumstances I give judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitors for defendants: *Botterell & Roche.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1898
Nov. 5.

BENNETT *v.* SLATER AND ANOTHER.

Friendly Society—Nomination by Member—Amount insured exceeding 100*l.*—*Revocation by subsequent Will—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-s.* 3.

A nomination made by a member of a friendly society under s. 15, sub-s. 3, of the Friendly Societies Act, 1875, to an amount not exceeding 100*l.* is valid, although the total amount payable by the society on the death of the nominator exceeds that sum. Such a nomination is not revocable in any manner other than that prescribed by the sub-section, and therefore is not revocable by a subsequent will of the nominator.

APPEAL from the judgment of Mathew J. upon an interpleader issue tried before him without a jury. (1)

The plaintiff was the daughter of William May, deceased: the defendants were the executors of his will. In 1864 the testator effected a policy of insurance for 100*l.* upon his own life in the Royal Liver Friendly Society, a society registered or deemed to be registered under the Friendly Societies Acts. On November 14, 1889, the testator, acting under the rules of the society, made a nomination in writing under s. 15 of the Friendly Societies Act, 1875, in favour of the plaintiff, by which he nominated her to receive from the society the sum of 100*l.* at his death, and directed her out of such sum to provide for his decent interment. On November 7, 1895, the testator made a will, of which the defendants were executors, which in substance directed that, after payment of funeral and testamentary expenses and debts, the residue of the testator's estate should be equally divided between two grandchildren. On October 29, 1896, the testator died, and on March 9, 1897, his will was duly proved by the defendants, and the probate was sent to the society for registration. Meanwhile the plaintiff had claimed the money from the society under the nomination, and had given written notice to the society that she objected to the money being paid over to the executors. All attempts

(1) [1898] 1 Q. B. 469.

C. A. 1898

BENNETT v. SLATER.

at settlement having failed, the plaintiff in September, 1897, issued a writ against the society to recover 100*l.*, and the society interpleaded, and paid the money into court, less certain admitted deductions. At the death of the testator the sum due under the policy, including certain accretions by way of bonus, was 104*l.* The total value of his estate including the policy was 117*l.* The debts and funeral expenses amounted to 33*l.* (1)

The learned judge gave judgment for the defendants.

Sir R. B. Finlay, *S.-G.*, and *Henry Sutton* (*Newton Crane* and *H. Burrows* with them), for the plaintiff. The will does not even affect to revoke the nomination; but, assuming that it must be construed as affecting to do so, the nomination was not revocable except in the manner provided for by sub-s. 3 of s. 15 of the Friendly Societies Act, 1875—that is to say, by writing under the hand of the nominator delivered at or sent to the registered office of the society. The bequest of the residue can only include that which was the testator's property

(1) By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 15, sub-s. 3, "A member of a society (other than a benevolent society or working men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society, to whom any moneys payable by the society on the death of such member, not exceeding fifty pounds, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and, on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid." Sub-sect. 4: "If any member of a society, entitled from the funds thereof to a sum not exceeding fifty pounds, dies intestate and without having made any nomination under this Act which remains unrevoked at his death, such sum shall be payable, without letters of administration, to the person who appears to a majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same."

By the Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 3, the sum of one hundred pounds was substituted for fifty pounds in the above section.

The Friendly Societies Act, 1875, and other Acts relating to friendly societies were repealed and in substance re-enacted by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), which came into operation on January 1, 1897.

at the time of his death. Upon the nomination the interest in this money vested in the nominee subject to the possibility of being divested by a revocation in the manner prescribed by the Act. There not having been any such revocation, the money did not form part of the testator's estate at the time of his death, and therefore is not included in the residuary bequest. But, even if the will did expressly revoke the nomination, such a revocation would be ineffective. The sub-section provides that, where there is a nomination in the manner thereby prescribed, the society shall on satisfactory proof of the death of the nominator pay the nominee. It provides for revocation of the nomination in a particular way; and the natural construction is that that is the only way in which revocation can take place.

Bonsey, for the defendants. The provisions of s. 15, sub-s. 3, of the Friendly Societies Act, 1875, are not applicable to this case. The true construction of the sub-section is that it only applies to cases where the total sum payable by the society upon the death of the member does not exceed 100*l.*

Further, it is submitted that the nomination was revocable by and was revoked by the will.

The cases contemplated by s. 15, sub-ss. 3, 4, are cases where, the amount insured not exceeding 100*l.*, there is no will, sub-s. 3 dealing with the case where, that being so, there is a nomination, and sub-s. 4 dealing with the case where there is not. In such cases, if there were no such provisions, administration would have to be taken out. The object of the legislation is to save poor people the expense of a will or of taking out administration in the case of insurances with friendly societies for small amounts not exceeding 100*l.*; and accordingly it is provided that, where in such cases there is a nomination, the money shall be paid to the nominee, and, where there is none, to the person who may appear to the majority of the trustees to be entitled to receive the same, without letters of administration. The case where there is a will dealing with the money is not contemplated.

[COLLINS L.J. The section does not appear to deal with intestacy except where there is no nomination. There is no

C. A. 1898

BENNETT v. SLATER.

reference to intestacy in sub-s. 3. How then can it be said that the purview of both sub-sections is confined to intestacy?]

The provision as to revocation contained in sub-s. 3 only provides a mode of revocation during life, and does not by implication involve that there may not be a revocation by will which can only speak from death. The nomination cannot stand on a higher footing than a will for which it is a statutory substitute, and it may consequently be revoked by a will made subsequently. It does not import any present interest in the nominee, or divest the nominator of his property in the money. The testator's assets without this money are insufficient to pay his debts, and the nominee ought not to be in a better position than that of a specific legatee of this money. It may be that in such a case on proof of the nominator's death the society, if they had no notice of a will, would have by virtue of the sub-section to pay over the money to the nominee; but it is submitted that, though in that case the payment might be valid as against the society, the executors or administrators would, if the nominator's estate were insolvent, have a right to recover the money from the nominee. [He referred on this point to ss. 8, 9 of the Provident Nominations and Small Intestacies Act, 1883.]

[He cited *Ashby* v. *Costin*. (1)]

Sir R. B. Finlay, *S.-G.*, was not called upon to reply.

A. L. SMITH L.J. It was contended for the defendants in the first place that s. 15, sub-s. 3, of the Friendly Societies Act, 1875, did not apply, because by reason of increments by way of bonus the sum payable by the society at the date of the testator's death amounted to 104*l*. I cannot agree with that contention. I agree that a nomination cannot be made under the sub-section for more than 100*l*., but in this case the nomination did not exceed that amount. I apprehend that the object of the Legislature in enacting the sub-section was to save legal expenses in the case of small estates, and to enable persons interested in them to receive sums payable by friendly societies to a certain amount without the necessity for

(1) (1888) 21 Q. B. D. 401.

taking out letters of administration. The effect of the sub-section as amended by the Act of 1883 is in my opinion that, if the amount payable does not exceed 100*l.*, the society is upon satisfactory proof of the death of the nominator without more to pay that amount to the nominee, thus avoiding the necessity for administration; but, if the total amount payable exceeds 100*l.*, then only 100*l.* can be paid to the nominee, and with regard to the excess over that amount the general law would apply, and, in order to obtain payment of that, it would be necessary to take out administration. In this case the sum payable under the nomination to the nominee upon the death of the nominator not exceeding 100*l.*, I think the nomination comes within the sub-section, and the argument for the defendants cannot prevail.

The second contention for the defendants was that the nomination was revoked by the will. With regard to that contention, I may in the first place remark that, where there has been a nomination as in the present case, until that nomination has been revoked I think that the nominee, and not the nominator, is the person beneficially interested in the money; and therefore I find a difficulty in seeing how under a residuary bequest this money can be considered as included. I will, however, pass that point by, though I think it a good one, and come to the question decided by my brother Mathew —namely, whether a nomination under the sub-section can be revoked otherwise than in the manner therein prescribed. In my judgment it cannot. The sub-section prescribes a special manner in which the nomination may be made, and a special manner in which it may be revoked; and it appears to me that, upon the true construction of the enactment, as a nomination can only be made in the prescribed manner, so it can only be revoked in the prescribed manner. It is provided, in the absence of a revocation, that, on receiving satisfactory proof of the death of the nominator, the society "shall" pay to the nominee the amount due to the deceased member not exceeding the sum aforesaid. All that the society have to do under the Act is to see that there has been a proper nomination, and that the nominator is dead, and then, if there has been no

BIBL. LONDIN UNIV

C. A. 1898

BENNETT v. SLATER.

A. L. Smith L.J.

revocation as provided for by the section, the enactment is imperative that they shall pay the amount to the nominee. They are not bound to inquire whether there is a will or not. In my opinion, assuming that the will is to be construed as revoking the nomination, which I think it is not, that revocation is ineffective. For these reasons I think the appeal must be allowed, and judgment entered for the plaintiff.

RIGBY L.J. I am of the same opinion. I think that the intention of the Legislature in passing the enactment in question may be gathered without difficulty from the language used. It is an enactment passed in favour of the members of friendly societies. The defendants ask us to construe it as an enactment only in favour of members of friendly societies insured to the extent of 100*l.* and no more. If a man could insure with a friendly society to an unlimited amount, there might be more to be said in favour of the defendants' contention, but it is difficult to see why a person insured for 200*l.* is not as meritorious a subject for the purposes of a provision such as this as one insured for 100*l.* (1) Reading the words of the sub-section as they stand, subject to the amendment made by the Act of 1883, they seem to me plainly to mean that a member of a friendly society may nominate a person to receive moneys payable by the society on his death to the amount of 100*l.* If we were to adopt the contention of the defendants, we should have to read into the sub-section words to the effect that, if the whole of the moneys payable by the society upon the death of the member exceeded 100*l.*, the sub-section should not apply. It does not appear to me that the sub-section contains any such words, and I see no reason why we should not take the words used in their literal meaning. I do not think there is any substance in the contention that the sub-section can only be intended to apply to cases where the total amount payable does not exceed 100*l.* The results of such a construction would be very strange. A man might insure with a society for 50*l.* and make a nomination in respect of that sum; and subsequently he might insure for a further sum of 100*l.*, and then, according

(1) See s. 8, sub-s. 1, of the Friendly Societies Act, 1875.

to the defendants' contention, the sub-section would not apply, and so a power of revocation would be given in a way not at all contemplated by the enactment, namely, by insuring a further sum.

The next question is whether there has been a revocation of the nomination. I think that the intention of the Legislature was to enable members of friendly societies to make by means of a nomination under the Act a gift of moneys insured by them with the society, although no doubt such a gift was not to be irrevocable, but might be revoked in the manner prescribed by the sub-section. It appears to me, that being so, that money, the subject of such a nomination which has not been revoked, forms no part of the residuary estate of the testator. The case of *Ashby* v. *Costin* (1), which was cited to us, is as nearly as possible an authority for that proposition; for there it was held that under the rules of the society the money insured was not an asset of the member, but was made by virtue of the bargain between the society and its members contained in the rules the property of the person prescribed by the rules, as it is here in my opinion made the property of the nominee by the operation of the sub-section. In this case, if the nominator had revoked the nomination in the manner prescribed by the Act, the money would have formed part of his estate; but he did not do so, and therefore, in my opinion, it was no part of his estate.

Assuming however that the will could be considered as revoking the nomination, the question arises whether there could be any other revocation than that provided for by the sub-section. I see no reason for thinking that there could. The Act provides for making the nomination, and for revoking it in a particular manner. Why should we imply that there is a power of revoking it by will? There is nothing in the Act to point to a will as a possible instrument of revocation. The Act says that upon satisfactory proof of the death of a nominator the society shall pay to the nominee. It is suggested that this must be read as meaning that the society shall pay on proof of the death unless they have notice of a will. But why should we import that qualification into the sub-section? The

(1) 21 Q. B. D. 401.

C. A. 1898

BENNETT v. SLATER.

Rigby L.J.

Act says that the society shall pay on proof of the death. The death might be proved before they had time to inquire as to the existence of a will. A will might not be proved for years. Yet it is suggested that, if the society had notice of a will which might be subsequently proved, they are not to pay. It appears to me that that suggestion is in direct contradiction of the Act. In this particular case as I have said there is no revocation of the nomination by the will further than may be implied from the residuary bequest; and, if I am right in my view of the Act, this money formed no part of the residue. But, if, as I think, the nominator could not revoke the nomination by will, then, if the will had purported expressly to revoke the nomination, such a revocation would have been ineffective.

It has been suggested for the defendants, as a way of meeting the difficulty arising from the provision that upon satisfactory proof of the death of the nominator the society shall pay to the nominee, that, if the member happened to die insolvent, his executor or administrator might recover the money so paid from the nominee. I can find no justification for that suggestion. A special provision is made by s. 9 of the Act of 1883 to the effect that, where the directors have made payments under the powers previously mentioned in that Act—that is, in cases where there is no nomination and no will—the payments shall be valid as against the society, but claimants shall have a remedy against the persons who have received the money; but that section is, in my opinion, indirect evidence against the suggestion that in such a case as this there could be any right of recourse against the nominee. Further, it is impossible to see how, if the money which forms the subject-matter of the nomination is not part of the testator's estate at his death, it could become an asset because he happened to die insolvent. For these reasons, I agree that the judgment should be reversed.

COLLINS L.J. I am of the same opinion on both points. I think that the true construction of the sub-section plainly is that the limit of 100*l.* therein mentioned applies to the amount of the sum which may be made by the nomination payable to

the nominee, and not to the amount of the sum payable by the society on the death of the deceased. I think it would be a very anomalous result that a member of a friendly society should altogether lose the privilege of making a nomination to the amount of 100*l.* because the total sum payable exceeded that amount.

The question remains as to the suggested revocation. It was clearly the intention of the Legislature to benefit members of these societies by providing for them a simple and convenient method of disposing of their property to a certain amount without a will or letters of administration and the formalities and expense incidental thereto. The nomination is no doubt a substitute for a will to some extent, but it does not follow that it is subject to all the incidents of a will. If a member of a friendly society disposes of his property in the way provided for by the sub-section, he does so with the incident that he can only revoke that disposition of it in the manner permitted by the sub-section. Here a nomination was duly made in respect of this money which remained unrevoked at the testator's death. The will only purported to deal with what might be the assets of the testator at the time of his death, and did not deal with this money specifically. It does not therefore appear to me that it can be construed as revoking the nomination. But, if there had been an express revocation of the nomination, I think, though it may not be necessary to decide the point, that such a revocation not being made in the statutory and only valid manner would have been ineffective.

Appeal allowed.

Solicitors for plaintiff: *Hyde, Tandy, Mahon & Sayer.*
Solicitors for defendants: *Letts Brothers.*

E. L.

C. A.

1898

Nov. 8.

[IN THE COURT OF APPEAL.]

WATSON *v.* PETTS.

Practice—Appeal from Order of Judge at Chambers—Prohibition to Judge of County Court—"Practice and Procedure"—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An application to a judge at chambers for a prohibition to restrain an inferior Court from exceeding its jurisdiction is not a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal lies to the Divisional Court and not, in the first instance, to the Court of Appeal.

APPEAL from an order of a judge at chambers.

The action was brought in a county court, and the judge made an order as to the plaintiff's costs. The defendant applied at chambers for a writ of prohibition to the county court judge to prohibit him from proceeding further in the matter, on the ground that the judge had no jurisdiction to make the order. The learned judge at chambers dismissed the application, and the defendant appealed direct to the Court of Appeal.

W. Clarke Hall, for the plaintiff, raised the preliminary objection that the appeal in such a case was to the Divisional Court and not to the Court of Appeal.

J. M. Stone, for the defendant.

A. L. SMITH L.J. We (1) have had an opportunity of consulting our brother Lords Justices (with the exception of Rigby L.J.) on the point raised, which is—whether, when a summons is taken out in chambers for an order to prohibit a county court judge from proceeding further in a matter before him, the appeal from chambers is to the Queen's Bench Division or direct to this Court. This depends upon the question whether an application for a prohibition to restrain an inferior Court from exceeding its jurisdiction is a matter of

(1) A. L. Smith and Collins L.JJ.

practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894.

We are of opinion that it is not, and that the appeal therefore is to the Divisional Court, and not to this Court in the first instance. The practice and procedure mentioned in the section cover matters of practice and procedure in connection with a cause or matter in the High Court, and not a matter in which a county court judge is sought to be prohibited from exceeding his jurisdiction in his court. Here the county court judge is said to have done something in his court which he had no jurisdiction to do. Thereupon application has been made to a judge of the High Court, not in any cause or matter in the High Court, but in relation to something which the judge of the county court has done or proposed to do in his own court. The judge of the High Court before whom the application came has made an order, and the appeal against that order must go to the Divisional Court, because the appeal is not embraced by the words "practice or procedure" in the Act of 1894, and the appeal is therefore not transferred direct to this Court by that Act.

Appeal dismissed.

Solicitors for plaintiff: *Chester & Co.*

Solicitors for defendant: *G. F. Hudson, Matthews & Co., for John Bamford, Son & Wilson, Ashbourne.*

A. M.

C. A.

1898

Nov. 9.

[IN THE COURT OF APPEAL.]

OWNERS OF CARGO ON BOARD SS. WAIKATO *v.* NEW ZEALAND SHIPPING COMPANY, LIMITED.

Ship—Bill of Lading—Exemption of Shipowner from Liability—"Defects latent on beginning Voyage or otherwise."

A bill of lading contained, among other exceptions, one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise" in hull, tackle, boilers, or machinery, or their appurtenances :—

Held, affirming the judgment of Bigham J., that the exception did not cover a defect which was obvious at the commencement of the voyage.

APPEAL from judgment of Bigham J. upon a preliminary question tried before him in the Commercial Court. (1)

The action was brought by the owners of a cargo of wool shipped on board the defendants' ship *Waikato* in respect of damage to cargo. The second clause of the bill of lading was as follows: "The act of God, the Queen's enemies, pirates, robbers by land or sea, detention, delay, or loss of any description, arising from strikes or locks out of officers, engineers, seamen, workmen, or labourers, or any circumstances beyond the shipowners' control, restraint of princes, rulers, or people, collision, stranding, jettison, barratry, loss or damage arising from accidents to or defects latent on beginning voyage or otherwise, or to hull, tackle, boilers, or machinery, or their appurtenances, steam, or bursting or leakage of pipes, or from explosion, heat, or fire on board, in bulk or craft or on shore, any act, neglect, or default whatsoever of pilots, master, or crew, or other servants of the company, the dangers and accidents of the seas, rivers, and canal and of navigation of whatever nature or kind are excepted."

For the purpose of the preliminary question it was assumed that the wool had sustained damage by reason of the holds in which it was stowed being insulated for use as refrigerating chambers, and consequently not being capable of proper ventila-

(1) [1898] 1 Q. B. 645.

tion for the carriage of wool. The question was whether this was an excepted defect within the meaning of clause 2 of the bill of lading. It was admitted by the defendants that the defect was not a latent defect.

Bigham J. gave judgment for the plaintiffs.

Joseph Walton, *Q.C.*, and *F. Laing*, for the defendants. The learned judge construed the words "defects latent on beginning voyage or otherwise" as only covering latent defects. There are two possible constructions of the words. One is that they cover defects, whether they are defects latent at the commencement of the voyage or not. The other is that they include only latent defects, whether latent at the commencement of the voyage or afterwards. The latter construction gives no real effect to the words "or otherwise." The words in question are only aimed at defects at the commencement of the voyage. All defects except those at the commencement of the voyage would be covered by the other words of the exception clause. The words in question are inserted to cut down the warranty of seaworthiness, and to meet such cases as that of *Owners of Cargo on Maori King* v. *Hughes*. (1) What kind of defect can be aimed at by the words "or otherwise" upon the construction contended for by the plaintiffs? It is difficult to see how there can within the scope of such an exception be a defect which, not being latent at the commencement of the voyage, becomes so afterwards.

Asquith, *Q.C.*, and *Scrutton*, for the plaintiffs, were not called upon.

A. L. SMITH L.J. I entirely agree with the judgment of my brother Bigham. The question is whether by this exception clause the shipowners have absolved themselves in this case from the liability which they primâ facie undertook to deliver the goods shipped in good order and condition. The exception is of "all loss or damage arising from accidents to or defects latent on beginning voyage or otherwise, or to hull, tackle, boilers, or machinery, or their appurtenances." The question is whether

(1) [1895] 2 Q. B. 550.

C. A. 1898

OWNERS OF CARGO ON BOARD SS. WAIKATO v. NEW ZEALAND SHIPPING COMPANY.

A. L. Smith L.J.

on any fair reading of that exception the words "or otherwise" can be read as including patent defects. I do not think those words would convey that idea to the mind of any ordinary person reading the clause; and there is ample authority that exceptions in a bill of lading must be clear and unambiguous if the shipowner is to be relieved from the liability which he has otherwise undertaken therein. In my opinion, therefore, the shipowners have not made out that this case comes within the exception. For these reasons I think the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. The plain grammatical construction of the clause in question is that which refers the words "or otherwise" to the immediately antecedent words "on beginning voyage." We might be restrained from adopting that construction if it could be shewn that an obvious absurdity would be thereby produced. But it seems to me that all that was urged for the defendants merely amounted to saying that the natural construction was probably not what the shipowners intended when they introduced those words. I think that upon the natural construction of the words "or otherwise" they may have a sufficient meaning by supposing them to refer to latent defects which only come into practical operation after the commencement of the voyage. In the case of such careless and ambiguous phraseology I do not think we ought to assume that the construction most advantageous to the shipowners represents the true meaning. If they do not make their meaning reasonably clear to the shipper, they ought not to be held to be protected by the exception.

COLLINS L.J. I am of the same opinion. I am not sure myself that the shipowners did not really mean to cover by the exception all defects at the beginning of the voyage whether latent or patent. I am inclined to think that they probably did mean to do so. But they are the persons setting up the exception, and who have to make out their exemption. I do not think they can sustain that onus, unless by unambiguous language they have excluded the liability which would primâ

facie rest upon them. I think that the language used in this case is far too ambiguous for that purpose.

C. A. 1898

OWNERS OF CARGO ON BOARD SS. WAIKATO v. NEW ZEALAND SHIPPING COMPANY

Appeal dismissed.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1898 *Nov.* 9, 17.

THE QUEEN *v.* JUSTICES OF WORCESTERSHIRE. THE QUEEN *v.* JUSTICES OF WARWICKSHIRE.

Licensing Acts — Justices — Jurisdiction — Outlying District of County — Transfer to other County — County Police Act, 1840 (3 & 4 *Vict. c.* 88), *s.* 2.

The transfer of an outlying district of a county to another county under the County Police Act, 1840, s. 2, does not effect a transfer of the licensing jurisdiction in that district to the justices of the other county.

APPEALS from the order of a Divisional Court (Mathew and Kennedy JJ.) upon cross rules for a prohibition obtained on behalf of the justices of Worcestershire and of the justices of Warwickshire respectively.

The parish of Yardley is a piece of land of a triangular shape about seven miles long and three miles wide at its widest part. It forms part of Worcestershire, and is bordered by the remainder of that county on one side and by Warwickshire on the two other sides, being almost surrounded by the petty sessional division of Solihull in the latter county and the city of Birmingham. In the year 1829, under the provisions of 9 Geo. 4, c. 43, it was made part of the Northfield petty sessional division of Worcestershire. In 1857 an agreement was made between the justices of Worcestershire and those of Warwickshire under the County Police Act, 1840, which was embodied in resolutions which they respectively passed at their respective quarter sessions in June of 1857, to the effect that the parish of Yardley should be considered as forming part of the county of Warwick for the purposes of the several Acts

C. A. 1898

REG. v. WORCESTERSHIRE JUSTICES.

REG. v. WARWICKSHIRE JUSTICES.

relating to county and district constables, and that the chief constables of each county should proceed to carry the same into effect. From that time down to 1874 the justices of Warwickshire exercised all the magisterial jurisdictions, excepting administrative jurisdiction, over Yardley, as forming part of the Solihull petty sessional division in that county, including the jurisdiction over licensing matters. From 1875 to 1894 the justices of Worcestershire exercised all jurisdictions, including licensing jurisdiction, over Yardley. In 1890 the Worcestershire magistrates created Yardley a petty sessional division of itself. The justices of Worcestershire obtained a rule nisi for a writ of prohibition to prohibit the justices of Warwickshire from exercising licensing jurisdiction in Yardley, which the Divisional Court discharged. The justices of Warwickshire obtained a rule nisi for a writ of prohibition to prohibit the justices of Worcestershire from exercising licensing jurisdiction in Yardley which the Divisional Court made absolute.

The justices of Worcestershire appealed. (1)

Nov. 9. *Asquith*, *Q.C.*, and *Roskill*, for the appellants.

(1) The County Police Act, 1840, s. 2: "And whereas by the said Act [the County Police Act, 1839] it is provided that, for the purposes of the said Act, all detached parts of counties shall be considered as part of that county by which they are wholly or partly surrounded; and whereas many populous towns are situated in more than one county; and also the boundary of many counties is so irregular that parts thereof, although not wholly separated from the main body of the county, may yet be more conveniently united, for the purposes of the said Act, with some neighbouring county; be it enacted that it shall be lawful for the justices of any two or more neighbouring counties, in their several general or quarter sessions assembled, from time to time to agree that such parts of their several counties as to them shall seem fit shall, for the purposes of the said Act, be considered as forming part of any other of the said counties; and, whenever any such district shall be so transferred, for the purposes of the said Act, from one county to another, with the consent of the justices of both the last-mentioned counties, such district shall be considered, for the purposes of the said Act, as if it were detached from the county to which it belongs and wholly surrounded by the county to which it is so transferred; and all the provisions contained herein or in the said Act, or in an Act passed in the last session of Parliament, intituled, 'An Act for the better administration of justice in detached parts of counties,' respecting detached parts of counties, shall be taken to apply to such transferred districts."

C. A. 1898

REG. v. WORCESTERSHIRE JUSTICES. REG. v. WARWICKSHIRE JUSTICES.

The agreement of 1857 did not in fact transfer the jurisdiction in respect of licensing matters in Yardley from the justices of Worcestershire to those of Warwickshire, and in point of law it was not competent for the justices to agree to make such a transfer. The agreement was made under the County Police Act, 1840 (3 & 4 Vict. c. 88), s. 2, which gives power to transfer outlying districts of one county to another "for the purposes of the said Act," that is, the County Police Act, 1839 (2 & 3 Vict. c. 93), which is "An Act for the establishment of county and district constables by the authority of justices of the peace." It is further provided by the section that the provisions of 2 & 3 Vict. c. 82, "An Act for the better administration of justice in detached parts of counties" shall apply to districts transferred under the Act. The effect is that the transfer is only for the specified purposes, namely, those of police and the administration of justice. The licensing jurisdiction does not come under either of these heads. By the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 7, in order to resolve doubts that had arisen, it was provided that the powers given to justices by 2 & 3 Vict. c. 82 in detached parts of counties should include cases of summary jurisdiction and acts merely ministerial; but this does not help the respondents, for since the case of *Boulter* v. *Kent Justices* (1) it is clear that licensing justices are not a court of summary jurisdiction, and their acts are not merely ministerial. The statute does not contemplate a transfer of part of one county to another for all purposes, but only a transfer for the particular purposes expressly mentioned. For all administrative purposes the part transferred still continues to form part of the county to which it originally belonged.

[They cited *Reg.* v. *Beckley* (2); *Blankley* v. *Winstanley* (3); *Rex* v. *Sainsbury*. (4)]

Bosanquet, Q.C., and *Bagnall Evans*, for the respondents. It would be very inconvenient that Yardley should belong for police purposes to one county and for licensing purposes to another, having regard to the duties imposed upon the police

(1) [1897] A. C. 556.
(2) (1887) 20 Q. B. D. 187.
(3) (1789) 3 T. R. 279.
(4) (1791) 4 T. R. 451.

C. A. 1898

REG. v. WORCESTERSHIRE JUSTICES.

REG. v. WARWICKSHIRE JUSTICES.

by the Licensing Acts: see 32 & 33 Vict. c. 27, s. 7; 33 & 34 Vict. c. 29, s. 4; 35 & 36 Vict. c. 94, s. 40.

Licensing business is petty sessional business. A special sessions is only a petty sessions held for a particular purpose, and the petty sessional division is necessarily the division for the purpose of special sessions. The statute 9 Geo. 4, c. 43, s. 1, provided for the formation of divisions of counties for the purposes of matters which previous Acts required to be transacted by justices within the divisions or limits within which the same arose; and the divisions so formed are to be the lawful divisions for holding special or petty sessions: see ss. 6, 7. See also 10 Geo. 4, c. 46; 22 & 23 Vict. c. 65; 40 & 41 Vict. c. 43, s. 5; Oke's Mag. Syn. 14th ed. 71. The Licensing Acts attach the jurisdiction over licensing matters to the petty sessional division. 9 Geo. 4, c. 61, s. 1, provides that in every division of a county there shall annually be held a special session to be called the general annual licensing meeting for the purpose of granting licences, and by s. 2 twenty-one days at least before such meeting a petty session of the justices is to appoint the time and place for holding it, and to direct the high constable to cause notice of it to be given as provided in the section. By s. 4 special sessions are to be appointed for transferring licences. 5 & 6 Vict. c. 44, s. 1, empowers justices in petty sessions to allow the transfer of licences. It is contended that the scope of the Licensing Acts is to attach the jurisdiction under those Acts to the justices who have jurisdiction to act at petty sessions in the particular place; and, therefore, that the effect of the agreement under 3 & 4 Vict. c. 88, by which Yardley was transferred to the county of Warwick, was to give the jurisdiction over licensing matters therein to the justices of Warwickshire acting for the petty sessional division in that county of which Yardley formed part, namely, Solihull. The 3 & 4 Vict. c. 88, s. 2, was dealing with a new creation, the county police, and with reference to that it expressly provided that for the purposes of police outlying districts of a county might be transferred from that county to another, and that the provisions contained in the County Police Acts with regard to

detached parts of counties should be taken to apply to such transferred districts. It further proceeded incidentally to provide that the provisions of 2 & 3 Vict. c. 82, the "Act for the better administration of justice in detached parts of counties" should apply to such transferred districts. It may be that, the jurisdiction over licensing matters not being strictly speaking a part of the administration of justice, the enactment cannot be said expressly to provide for the transfer of that jurisdiction, but the question is whether such a transfer is not a legal consequence, having regard to the scheme of the Licensing Acts, of a transfer of a district from one county to another under the section. The scheme of the Licensing Acts is to give the licensing jurisdiction to those who are the administrators of justice in the petty sessional division. Having regard to the purview of 3 & 4 Vict. c. 88, it is contended that no implication arises from the express mention of police purposes and the administration of justice that the licensing jurisdiction was intended to be excluded.

Asquith, Q.C., in reply. The jurisdiction to act at the general annual licensing meeting is not confined to justices of the particular division in which it is held, but is given to all the justices of the county. [He cited *Reg.* v. *Whittles.* (1)]

Cur. adv. vult.

Nov. 17. A. L. SMITH L.J. read the following judgment:— The question raised between the counties of Worcester and Warwick in these two appeals is whether the justices of Worcestershire or the justices of Warwickshire have jurisdiction to administer the licensing laws in an outskirt of Birmingham, called Yardley, which is geographically situated in Worcestershire and is bordered on two of its sides by Warwickshire and on its third side by Worcestershire.

In the year 1829 Yardley, under the provisions of 9 Geo. 4, c. 43, was made part of the Northfield petty sessional division, which is a petty sessional division of the county of Worcester. It is not disputed that from the year 1829 until the year 1857

(1) (1849) 13 Q. B. 248.

C. A. 1898

REG. v. WORCESTERSHIRE JUSTICES. REG. v. WARWICKSHIRE JUSTICES.

A. L. Smith L.J.

the justices of Worcestershire were the persons to administer as regards Yardley the jurisdictions appertaining to justices in petty sessions and also the licensing laws therein, and that they did so. In the year 1857 an agreement was come to between the justices of Worcestershire and the justices of Warwickshire, which is evidenced by joint resolutions come to at their respective quarter sessions holden in June, 1857, whereby it was agreed to consider the parish of Yardley, situated in the county of Worcester, as part of the county of Warwick for the purposes of the several Acts relating to county and district constables, and that their respective chief constables should immediately proceed to carry the same into effect.

The first point to be determined is, assuming that this agreement of 1857 was an agreement to transfer the jurisdiction of the administration of the licensing laws in Yardley from the justices of Worcestershire to the justices of Warwickshire, was there power to make such an agreement?

I may here state, as part of the history of the case, that, after this agreement was come to in 1857, from that year down to the year 1874 the justices of Warwickshire exercised all jurisdictions excepting administrative jurisdiction over Yardley, as forming part of the petty sessional division of Solihull, in that county, including the jurisdiction of administering the licensing laws therein. From 1875 to 1894 the justices of Worcestershire exercised all jurisdictions, including licensing jurisdiction, over Yardley. How this change came about, we are told, is not known. In 1890 the Worcestershire justices created Yardley a petty sessional division of itself under 9 Geo. 4, c. 43, and since 1894 matters have been in dispute between the two counties.

It is argued on behalf of Warwickshire, and this argument has prevailed in the Queen's Bench Division, that, as by the Licensing Act of 1828 (9 Geo. 4, c. 61) and other Acts licensing jurisdiction is attached to petty sessional divisions, on the transfer by agreement of Yardley, which formed part of the petty sessional division of Northfield, in Worcestershire, to form part of Warwickshire and thus become part of the petty sessional divisional of Solihull, in Warwickshire, there were

thereby transferred to the Warwickshire justices the jurisdictions ordinarily appertaining to justices sitting in petty sessional divisions, and that the administration of the licensing laws was one of these jurisdictions, and the justices of Warwickshire could, therefore, exercise licensing jurisdiction over Yardley. However this may be, this argument and the judgment founded thereon ignore the difficulty which remains and which is not taken notice of by the Queen's Bench Division. The difficulty in the way of this argument is that by the Act of 1840 (3 & 4 Vict. c. 88), by which a transfer by agreement of one part of a county to another county can alone take place, no general transfer of jurisdiction is authorized, but, on the contrary, the transfer of a limited jurisdiction is alone provided for—namely, a transfer "for the purposes of the said Act," "an Act for the establishment of county and district constables" (2 & 3 Vict. c. 93), and this Act has nothing to do with the exercise of licensing jurisdiction. A transfer by agreement of one part of a county to form a part of another county, except for the purposes of the County Police Act (2 & 3 Vict. c. 93), is nowhere authorized. It is true that by the Act of 1840 (3 & 4 Vict. c. 88) its provisions and also the provisions of the Act of 1839 (2 & 3 Vict. c. 82), "An Act for the better administration of justice in detached parts of counties," are to apply to the transferred districts; but neither in the Act of 1840 nor in the Act of 1839 (2 & 3 Vict. c. 82) for the better administration of justice can it be found that licensing jurisdiction is dealt with or included. I am alive to the inconvenience of the justices of Warwickshire having police jurisdiction in Yardley and not licensing jurisdiction; they have not administrative jurisdiction; and, as to summary jurisdiction and ministerial matters, see Jervis's Act (11 & 12 Vict. c. 42), s. 7. If I could I would come to the same conclusion as the Queen's Bench Division; but I am unable to construe the statutes so as to effect what the Queen's Bench Division has held to be effected thereby—namely, that the justices of Warwickshire are the justices to administer the licensing laws in Yardley.

There is another ground which appears fatal to Warwickshire, which is that, by the terms of the agreement of 1857, the

C. A. 1898

REG. v. WORCESTERSHIRE JUSTICES. REG. v. WARWICKSHIRE JUSTICES.

licensing jurisdiction in Yardley was not, in fact, agreed to be transferred to the justices of Warwickshire, but Yardley was transferred to Warwickshire for the purposes only of the several Acts relating to county and district constables, which have no relation to the administration of the licensing laws; but it is unnecessary to say anything as to this. In my judgment Worcestershire is right, and its appeal must be allowed.

RIGBY L.J. and COLLINS L.J. concurred.

Appeal allowed.

Solicitors for appellants: *Clarke & Blundell, for S. Thornely, Worcester.*

Solicitors for respondents: *Field, Roscoe & Co., for A. S. Field, Leamington.*

E. L.

1898 *Nov.* 15.

In re THOMAS. *Ex parte* TRUSTEE.

Bankruptcy—Receiving Order—Sheriff—Poundage—Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55)—*Order as to Fees of August* 31, 1888—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 1.

A sheriff's officer is not entitled to poundage where, after he has seized goods in execution under a writ of fieri facias, a receiving order is made against the judgment debtor, and the goods are delivered to the trustee in bankruptcy in pursuance of s. 11, sub-s. 1, of the Bankruptcy Act, 1890.

APPEAL from a decision of the judge of the Edmonton County Court.

The sheriff of Essex having seized goods of H. P. Thomas under a writ of execution issued in an action against him, a receiving order was made against Thomas on his own petition, and on the following day, the sheriff being still in possession and not having sold the goods, the official receiver served notice on the sheriff that the receiving order had been made, and requiring him to deliver up the goods. The sheriff accordingly delivered the goods to the official receiver. Subsequently a trustee in bankruptcy was appointed, to whom the sheriff sent in his bill of charges, which included poundage. On taxation

1898

THOMAS, *In re.* TRUSTEE, *Ex parte.*

of this bill the registrar of the county court disallowed the poundage. Upon a review of the taxation before the county court judge, he held that the sheriff was entitled to poundage.

The trustee appealed from this decision.

J. D. Crawford, for the appellant. Under s. 11, sub-s. 1, of the Bankruptcy Act, 1890 (1), the sheriff, where notice of a receiving order against the judgment debtor has been given before sale of the goods seized in execution, is only entitled to the "costs of the execution." Sect. 11, sub-s. 1, is substantially a reproduction of s. 46, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the "costs of the execution," under s. 46, sub-s. 1, were held, where there had been no sale, not to include poundage: *In re Ludmore*. (2) In *In re Harrison, Ex parte Sheriff of Essex* (3), the "costs of the execution," under s. 11, sub-s. 1, of the Act of 1890, were said to mean the costs of the execution up to the time of the service on the sheriff of notice of a receiving order. The learned county court judge was, therefore, wrong in holding that the sheriff was entitled to poundage in this case.

Muir Mackenzie, for the respondent. Sect. 20, sub-s. 2, of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), empowers the Lord Chancellor, with the advice and consent of the judges of the Court of Appeal and the High Court of Justice, or any three of them, and with the concurrence of the Treasury, to fix the fees and poundage of sheriffs, or their officers, concerned in the execution of process. The Order of August 31, 1888, made in pursuance of that Act (4), prescribes the fees which may be

(1) The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1: "Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

(2) (1884) 13 Q. B. D. 415.

(3) [1893] 2 Q. B. 111.

(4) "Order as to Fees. The Sheriffs Act, 1887. Aug. 31, 1888 . . . . Table of Fees." (The table of fees specifies the fees and expenses which may be charged by a sheriff's officer

1898

THOMAS, *In re.* TRUSTEE, *Ex parte.*

taken by the sheriff, and they include poundage. The Order in effect provides that when an execution is stopped the fees, including poundage, shall be paid by the person at whose instance the sale is stopped. The sheriff in this case was, therefore, entitled to poundage from the trustee who stopped the sale. Sect. 11, sub-s. 1, of the Bankruptcy Act, 1890, varies from s. 46, sub-s. 1, of the Bankruptcy Act, 1883. Under s. 11, sub-s. 1, a request for the delivery of the goods, as well as notice of the receiving order, is made necessary. Where the sale is stopped at the request of the trustee, there is no reason why he should not pay poundage on the value of the levy. *In re Harrison, Ex parte Sheriff of Essex* (1), only decided up to what date possession money was payable.

J. D. Crawford, in reply. The words in the Order as to Fees, "where an execution is stopped," refer to a stoppage by parties, and not by operation of law. The sheriff's right to poundage is derived from the Act of Parliament, not from the Order. *In re Harrison, Ex parte Sheriff of Essex* (1), was decided after the making of the Order, and is in point to shew that the sheriff, under s. 11, sub-s. 1, of the Bankruptcy Act, 1890, is only entitled to the costs of the execution up to the date of the notice that a receiving order has been made.

WRIGHT J. I think we are bound to follow the concluding words of the judgment of Vaughan Williams J. in *In re*

---

in the execution of writs of fieri facias under heads numbered 1 to 11. The 8th, 9th, and 10th heads relate to advertising a sale by auction; commission to the auctioneer; and percentage on a sale by private contract respectively.)

"11. Sheriff's poundage and the fee for delivery of the writ to the undersheriff shall be the same as before the making of this Order."

The Order continues: "The foregoing fees, numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, shall be levied in every case in which an execution is completed by sale, as fees payable to sheriffs were levied before the making of this order. In every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be; and the amount of any costs and charges payable under this scale shall be taxed by a master of the Supreme Court or district registrar of the High Court (as the case may be) in case the sheriff and the party liable to pay such costs and charges differ as to the amount thereof."

(1) [1893] 2 Q. B. 111.

Harrison, Ex parte Sheriff of Essex. (1) That learned judge said: "It is the duty of the sheriff, when served with notice of a receiving order, to hand over the goods or their proceeds to the official receiver. He is then entitled under the sub-section to the costs of the execution up to the date of such notice." The costs of the execution up to that date do not include poundage. I am also inclined to think that, had the matter been res integra, I should have come to the same conclusion. No doubt the words in the Order made under the Sheriffs Act, 1887, are quite general. They are: "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this Order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped (as the case may be)." But some of the fees specified in the Order—those numbered 8, 9, and 10, for instance—are fees which could hardly be properly allowed where there had been no sale, and I think that poundage is intended to be in the same position. On both these grounds I am of opinion that the sheriff's right to poundage is determined when the execution is stopped by service on the sheriff of notice of the receiving order. The appeal must, therefore, be allowed.

DARLING J. I am of the same opinion.

Appeal allowed. Leave to appeal.

Solicitors for appellant: *Charles A. Bannister & Reynolds.*
Solicitors for respondent: *Powell & Skues.*

(1) [1893] 2 Q. B. 111.

W. A.

C. A.
1898
Nov. 19.

[IN THE COURT OF APPEAL.]

BILLINGS *v.* HOLLOWAY.

Employer and Workman—Compensation—Personal Injury by Accident—Employment—Building exceeding thirty feet in height—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *s.* 7, *sub-s.* 1.

Where an accident happens to a workman employed on, in, or about a building in the course of construction which, although intended when completed to exceed thirty feet in height, does not at the time of the accident exceed that height, the Workmen's Compensation Act, 1897, does not apply.

APPEAL from the decision of the judge of the Clerkenwell County Court upon a question of law under the Workmen's Compensation Act, 1897.

The appellant was a labourer who had been in the employ of the respondent, a builder. The respondent was engaged in the erection of a building by means of a scaffolding on the site of a previously existing building, which he had demolished, under a contract with the building owner by which the new building when completed was to exceed thirty feet in height. The appellant, while employed in the building operations, was injured through a brick falling upon his head from the scaffolding. At the time of the accident, no part of the building had reached the height of thirty feet, the highest part of it being then only twenty-six feet from the ground.

The appellant having claimed compensation under the Workmen's Compensation Act, 1897, the county court judge held that the employment in which the appellant was engaged when the accident happened was not one to which the Act applied. (1)

(1) Workmen's Compensation Act, 1897, s. 7, sub-s. 1: "This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof."

Bassett Hopkins, for the appellant. The Act applies to a building in the course of construction which is intended when completed to exceed thirty feet in height. Take the case of the demolition of a building exceeding thirty feet in height: it could not surely be contended that, as soon as the building was pulled down to the height of thirty feet, the Act which previously applied to the building ceased to apply. [He referred to the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 23, sub-s. 2.]

Ruegg, Q.C., and *Groser*, for the respondent, were not called upon.

A. L. SMITH L.J. The question is whether a workman who is employed on a building in the course of erection which is less than thirty feet in height, but which is intended when completed to exceed that height, comes within the Workmen's Compensation Act, 1897. The words of the Act are, "employment on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." No words could be plainer. The contention of the appellant requires some such words as, "or which may thereafter exceed thirty feet in height." But there are no such words in the Act, and we cannot add them. I am of opinion that this appeal should be dismissed.

RIGBY L.J. and COLLINS L.J. concurred.

Appeal dismissed.

Solicitor for appellant: *Edward Clarke.*
Solicitors for respondent: *William Hurd & Son.*

E. L.

1898
Nov. 10, 14.

THE ATTORNEY-GENERAL ON THE RELATION OF THE WARWICKSHIRE COUNTY COUNCIL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Public Body—Infringement of Statute—Information by Attorney-General—Injunction—Evidence of Injury—Railway Company—Level Crossing—Speed of Trains—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 48.

Upon an information filed by the Attorney-General to restrain a public body from exercising statutory powers in such a manner as to infringe an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of.

By the Railways Clauses Consolidation Act, 1845, s. 48, "Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour." A railway company had power, by a statute incorporating this clause, to cross a road, to which the clause applied, on the level. They constantly drove their trains over the level crossing at a speed exceeding four miles an hour.

On an information, filed by the Attorney-General, on the relation of the County Council in whom the road was vested, for an injunction to restrain the company from allowing their trains to cross the level crossing at a speed greater than four miles an hour :—

Held, that, as the information was filed to enforce the express terms of an Act of Parliament, an injunction must be granted, although there was no evidence of any injury to the public.

Attorney-General v. *Great Western Railway*, (1872) L. R. 7 Ch. 767, *Attorney-General* v. *Cockermouth Local Board*, (1874) L. R. 18 Eq. 172, and *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.*, (1882) 21 Ch. D. 752, approved and followed.

ACTION tried before Bruce J. without a jury.

An information was filed by the Attorney-General, on the relation of the Warwickshire County Council, against the defendants, the London and North Western Railway Company, for an injunction to restrain the defendants from allowing their trains to cross the Watling Street at the level crossing adjoining Atherstone Railway Station at a speed greater than four miles an hour.

The facts proved at the trial, and the effect of the statutory provisions on which the liability of the defendants depended, are fully stated in the judgment.

Nov. 10. *Asquith, Q.C., Dickens, Q.C.*, and *P. Bagnall Evans*, for the plaintiffs.

Sir Edward Clarke, Q.C., W. Graham, and *Ernest Moon*, for the defendants.

Cur. adv. vult.

Nov. 14. The following written judgment was delivered by

BRUCE J. In this case the Attorney-General, on the relation of the Warwickshire County Council, has instituted an action against the London and North Western Railway Company for an injunction to restrain the Company from allowing their trains to cross the Watling Street at the level crossing adjoining Atherstone Railway Station at a speed greater than four miles an hour.

The main facts are undisputed. The Watling Street at the point in question is a main road, within the meaning of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 13, is within the administrative county of Warwick, and is vested in the County Council pursuant to s. 11 of the Local Government Act, 1888 (51 & 52 Vict. c. 41). The County Council, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealings with, such road, have the same powers as a highway board, and have the same powers as a highway board for preventing and removing obstructions to the road. The defendants or their predecessors in title obtained power by the Trent Valley Railway Act, 1845 (8 & 9 Vict. c. cxii.), to carry their railway across the road at the point in question on the level, and with this Act was incorporated the Railways Clauses Consolidation Act, 1845. The 48th section of the last-mentioned Act enacts that: "Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than

1898

ATTORNEY-GENERAL v. LONDON AND NORTH WESTERN RAILWAY.

Bruce J.

four miles an hour . . . ." This latter enactment has never been relaxed, and it is still applicable to the defendant Company, so that the right of the Company to cross the Watling Street at the point in question is subject to the express terms imposed by the Legislature, that the trains of the Company shall not cross the road at the level crossing at a speed of more than four miles an hour.

The only question for decision is whether the terms imposed by the Legislature can be enforced by injunction in this action.

It is admitted that for a long time past the Company have disregarded the conditions imposed, and have constantly caused their trains to cross the level crossing at a speed greatly exceeding four miles an hour. The crossing in question is part of the main line of the London and North Western Railway, and it is said that about 120 express, passenger, or goods, trains pass over the crossing every twenty-four hours. It is beyond question that the vehicular traffic on the road is seriously impeded by reason of the railway traffic. The railway line is worked upon the block system under the direction of the Board of Trade. Under this system the line is divided into sections, and the gates at the level crossing are kept closed across the road so long as any train is within the limits of the section in which the crossing is situate. In one direction the section extends 1340 yards from the level crossing, and I suppose it extends nearly the same distance in the opposite direction, so that, before the approach of a train within a distance to cause danger to vehicular traffic, the gates are closed across the road, and are kept so closed until the train has passed to a safe distance in the other direction. The result is that the gates are kept closed across the road from five to fifteen minutes at a time, and they are ordinarily kept closed against the public during the twelve hours extending from 6 A.M. to 6 P.M., for a period ranging from 275 to 319 minutes, or for an average during each hour during that period varying from twenty-three to twenty-six minutes. The defendants contend in substance that the Court in its discretion ought to refuse the injunction, because they say that the inconvenience of which the public complain will not be diminished, but will

be increased, if they are obliged to slow down the speed of all their trains as they approach the level crossing. Of course, it stands to reason, if the present system is maintained, and the length of the section is not lessened, that the trains, if they go more slowly, will remain a longer time in the section, and the gates across the road will consequently be closed for a longer period. The plaintiffs contend that, if the trains are all compelled to slow down as they approach the level crossing, it will be quite safe to shorten the length of the section, and that, at all events, whether the trains go slow or fast, the Company is not entitled, even for the purpose of the convenient use of their railway, unreasonably to obstruct the vehicular traffic on the road, and that the right of the Company to cross the road is subject to the right of carts and carriages to pass. But, in the view I take of this case, it is wholly unnecessary for me to enter into these considerations. There are, no doubt, cases in which the object of the action has been to restrain a nuisance, and the Courts have refused to act in the absence of evidence to prove that substantial injury has been caused by the acts complained of, or there has been some substantial interference with the rights of the public. But these cases differ altogether from an action such as the present, which is an information to enforce the express terms of an Act of Parliament. The Legislature having imposed certain conditions for the protection of the public, it is the duty of the Court, on the application of the Attorney-General, on the relation of the local authority charged with the protection of the public rights in question, to enforce the provisions of the law.

Jessel M.R., in the case of *Attorney-General* v. *Cockermouth Local Board* (1) said: "Now, if I understand the law upon the subject, it is not necessary for the Attorney-General to shew any injury at all. The Legislature is of opinion that certain acts will produce injury, and that is enough." That case is an instructive case, and well illustrates the distinction between the two classes of cases, the one class in which substantial injury must be proved, the other class in which no evidence need be given of actual injury. The clerk of the

(1) L. R. 18 Eq. 172, at p. 178.

1898

ATTORNEY-GENERAL v. LONDON AND NORTH WESTERN RAILWAY.

Bruce J.

Workington Local Board was the relator, and the evidence failed to shew that there was any pollution to water taken from the river at Workington. Yet because, contrary to the provisions of an Act of Parliament, the defendants had polluted the water of the river at a point eight miles above Workington, an injunction was granted in the suit promoted by the Attorney-General. At the same time a bill by the Local Board of Workington, alleging nuisance committed by the defendants, was dismissed, because the plaintiffs failed to adduce any evidence of a nuisance committed by the defendants.

In the case of *Attorney-General* v. *Great Western Railway* (1), the Railway Company had made a new connection between two branch lines of railway, and had opened it without previous notice to the Board of Trade, as required by statute. Wickens V.-C., in granting an injunction to restrain the defendants from using the new connection, said: "It is said, however, that the unsanctioned alteration is an improvement, and tends to the greater safety and advantage of the public; but in my opinion that is a matter with which we have nothing to do." (2)

The whole of the cases on the subject are reviewed by Fry J. in the case of *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (3), and that learned judge arrived at the opinion that when a public company do acts, which are illegal, and tend in their nature to interfere with public rights, the Attorney-General is justified in interfering, though there is no evidence of actual injury to the public.

In the present case I think there can be no doubt that the provision inserted in the Railways Clauses Act respecting the speed at which trains should pass over the level crossing in question was intended for the protection of the public. The defendants are committing an illegal act in disregarding that provision. They have no right to pass over the Watling Street except on the terms imposed, and it is not for the Court to disregard the terms which the Legislature has formulated, or to treat them as superseded and inoperative. The Court is bound,

(1) L. R. 7 Ch. 767. (2) L. R. 7 Ch. at p. 770, n. (1).
(3) 21 Ch. D. 752.

1898

ATTORNEY-GENERAL v. LONDON AND NORTH WESTERN RAILWAY.

upon the application of the Attorney-General, acting upon the relation of the public body charged with the protection of the public rights on the road in question, to grant the injunction asked for.

I pronounce for the injunction with costs.

Of course, if the defendants ask for time, in order to carry out any arrangements they may have to make, time will be granted; but if no time is asked for, the injunction must go in accordance with the prayer in the statement of claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Field, Leamington.*

Solicitor for defendants: *C. H. Mason.*

P. B. H.

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.]

1898 *Nov.* 12.

THE QUEEN *v.* RHODES.

Criminal Law—False Pretences—Evidence of subsequent Frauds—Right of Prisoner to give Evidence before Grand Jury—Right of Court to Comment on Prisoner's Failure to give Evidence—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

On the trial of an indictment for obtaining eggs by false pretences, it was proved that the prisoner had falsely represented by advertisements in newspapers that he was carrying on a bonâ fide dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements:—

Held, that the evidence was properly admitted.

The Criminal Evidence Act, 1898, does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury, nor does it deprive the Court of the right to comment on the failure of the prisoner to give evidence at the trial.

CASE stated by the chairman of quarter sessions for the Isle of Ely.

The defendant had been committed for trial on a charge of obtaining a certain quantity of eggs on the false pretence to one

1898

REG. v. RHODES.

William Bays, that he was then carrying on business as a farmer or dairyman, and did then require eggs for use in the said business, and was then in a position to pay for the said eggs, by means of which said false pretences he did then unlawfully obtain from the said William Bays 660 eggs of the value of 2*l.* 10*s.* with intent to defraud.

Before the bill of indictment was sent to the grand jury the defendant, who was in custody, applied in person, under s. 1 of the Criminal Evidence Act, 1898, to give evidence for the defence before the grand jury. The chairman declined to permit him to do so on the ground that the Act did not allow a prisoner to give evidence on his own behalf before the grand jury, but reserved the point for the consideration of the Court for Crown Cases Reserved.

The grand jury having found a true bill, it was proved by the prosecution that the defendant had advertised for new-laid eggs in the newspapers circulating in the county, that he gave no name, but only an address, "Norfolk Farm Dairy, High Street, Mitcham, Surrey," and that the prosecutor, believing that he was dealing with a responsible firm, sent two consignments of eggs for which he was never paid. Further evidence was given to prove that the defendant had no right to the title "Norfolk Farm Dairy," as that name had been left painted over the shop-front by a former occupier, who sold his business and goodwill in March, 1897, the defendant having gone to reside there nearly a year afterwards.

In the course of the trial two witnesses, William Elston and James Chambers, were called for the prosecution to prove that the defendant had obtained eggs of them also, and that they had sent him twelve dozen and fifteen dozen eggs respectively under precisely similar conditions to those sent by the prosecutor. Counsel for the defence objected to the reception of this evidence; but the chairman overruled the objection and admitted the evidence, but reserved this point also for the consideration of the Court.

At the close of the case for the prosecution, counsel for the defendant intimated that he called no witnesses for the defence, and both counsel then addressed the jury. In summing up the

1898

REG. v. RHODES.

evidence to the jury, the chairman pointed out that it was open to the defendant to give evidence on his own behalf under the Criminal Evidence Act, 1898. Counsel for the defence objected; but the chairman ruled that the prohibition in s. 1 (*b*) of the Act did not apply to the Court, but reserved this point also for the consideration of the Court.

The jury returned a verdict of guilty, and the defendant was sentenced to ten months' imprisonment.

No counsel appeared for the defendant.

H. St. John Raikes, for the prosecution, was only required to argue the second point, as to the admissibility of the evidence.

[LORD RUSSELL of KILLOWEN C.J. The case does not state whether the transactions with Elston and Chambers were prior or subsequent to the offence charged.]

They were both subsequent to the transaction with Bays—one shortly after it, and one two months after it; but they both took place in consequence of the same advertisement, which continued to appear in the newspapers. It is clear that they would have been admissible in evidence had they taken place prior to the offence charged: *Reg.* v. *Francis*. (1) That case practically overruled *Reg.* v. *Holt*. (2) It can make no difference that the acts sought to be given in evidence took place after the offence charged if they were induced in fact by the same false pretence.

[WRIGHT J. In Roscoe's Criminal Evidence, 11th ed. p. 94, it is said: "It is still doubtful whether pretences made subsequently to the one charged are admissible; but it seems, both on authority and on principle, that they are not, on the ground that it is possible that the guilty intention may not have arisen till after the acts upon which the charge is founded."]

No doubt a separate false pretence wholly unconnected with the pretence charged, and made subsequently to it, might not be admissible in evidence; but here the false pretence is the advertisement, from which the inference was that the defendant

(1) (1874) L. R. 2 C. C. 128.
(2) (1860) Bell C. C. 280; 30 L. J. (M.C.) 11.

1898

REG. v. RHODES.

was carrying on a bonâ fide business. The evidence was therefore admissible to shew the fraudulent intent: *Reg.* v. *Cooper*. (1) [He also cited *Reg.* v. *Foster*. (2)]

LORD RUSSELL of KILLOWEN C.J. In this case there are three points which we have to decide. The first is that, before the bill was sent up to the grand jury, the prisoner applied under s. 1 of the Criminal Evidence Act, 1898, to give evidence for the defence before the grand jury. The chairman refused to allow him to do so; and in my opinion he was quite right in his refusal. The question depends on the construction of s. 1 of the Criminal Evidence Act, 1898, which provides (omitting the immaterial words) that "Every person charged with an offence . . . . shall be a competent witness for the *defence* at every stage of the proceedings." It is clear that the limitation of the right of a person charged with an offence to give evidence is that he may be called for the defence, and for the defence alone. A grand jury have nothing whatever to do with the defence. Their functions are well known. They sit in private. They have to hear the evidence, or at any rate part of the evidence, for the prosecution, and to say whether in their opinion a primâ facie case against the prisoner has been made out. It would be difficult to believe that the Legislature intended by this section to enable a grand jury to hear evidence for the defence. Such a thing would be no less than an anomaly. It is worth notice that, if the prisoner were to go before the grand jury and give evidence, nevertheless, if they thought that the evidence for the prosecution disclosed a primâ facie case against him, they would be unable to give any effect to the prisoner's evidence, even although they believed it to be true. It is sufficient, therefore, to say that the prisoner can only give evidence for the defence, and that as that does not arise before the grand jury, who have not to determine finally the guilt or innocence of the prisoner, he cannot give evidence before the grand jury.

The second point for our consideration is whether the evidence of Elston and Chambers was admissible for the prose-

(1) (1875) 1 Q. B. D. 19. (2) (1855) 24 L. J. (M.C.) 134.

cution. The case is not as carefully and precisely stated as we could have wished; but it appears that there was a charge of obtaining eggs from one Bays by the false pretence that the prisoner was carrying on business as a farmer or dairyman. The false pretence, briefly put, was that the prisoner was honestly carrying on such a business, and required eggs for the purposes of such a business; and the prisoner appears to have advertised for a considerable time in various newspapers his wants for eggs. The prosecution alleged that the business was in truth and in fact a "bogus" business, and that the prisoner was not in a position to pay for the eggs. The charge before the Court was of obtaining eggs by false pretences from Bays, as I have said, and it was necessary, therefore, to prove these false pretences as made to Bays; but Elston and Chambers were also called for the prosecution to prove that they had acted on the same advertisement, and had supplied eggs to the prisoner in separate transactions of a similar nature to that between the prisoner and Bays, and had been defrauded.

Here again we have to complain of the want of precision in the case. We are not told in the case when these transactions took place; but we are informed by counsel that both transactions were subsequent to the dealing with Bays in respect of which the prisoner was charged, and that one of the transactions took place as much as two months after that time.

It seems to me quite clear that, if the transactions with Elston and Chambers had taken place before that with Bays and at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner. Is that evidence admissible although the transactions were subsequent to the offence charged?

That depends, as it seems to me, on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business, but that the business in which he was engaged was from first to last a bogus or sham business. If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner with no connection between them, I should certainly say that evidence of transactions which took place after the offence charged

1898

REG. v. RHODES.

Lord Russell C.J.

was not admissible, more especially if such transactions took place two months after the offence. But here, as I have said, the charge to be made out was that of carrying on a bogus business; and on the whole I think that the evidence was admissible on the ground that it shewed part of a scheme to defraud persons by the pretence of carrying on an honest and bonâ fide business. The means by which the fraud was perpetrated was by advertisements in newspapers, which the prosecutor Bays and the witnesses Elston and Chambers alike saw and alike acted upon. The transactions in all three cases were, therefore, connected by the advertisement which formed part of the scheme.

I do not think that our decision conflicts with *Reg.* v. *Holt.* (1) There the false pretence charged was a distinct and separate transaction, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred. *Reg.* v. *Francis* (2) is nearer to the present case, and, although there it is true that the transaction admitted in evidence was prior to that on which the charge was founded, yet it seems to me that the reasoning of that case will apply here. Lord Coleridge C.J., in delivering the judgment of the Court, said (3): "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to shew that he was pursuing a course of similar acts; and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shews he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority. . . . . Now in the present case the prisoner was tried on two charges of attempting on

(1) 30 L. J. (M.C.) 11. (2) L. R. 2 C. C. 128.
(3) L. R. 2 C. C. at pp. 131, 132.

January 8, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewellery consisted of real stones. Evidence that he on January 6, at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold when it in fact was not gold, was surely matter from which the jury might infer that he was in a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine . . . . and though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had guilty knowledge is as legitimate as if it had been a second false chain."

Although, as I have said, that fact was in *Reg.* v. *Francis* (1) anterior to the offence charged, yet that reasoning seems applicable to admit evidence of such facts although subsequent, if there is, as there is here, a nexus or connection between the act charged and those facts.

The third and last question is whether the presiding judge has a right under the Criminal Evidence Act, 1898, to comment on the failure of the prisoner to give evidence on his own behalf. In this case the prisoner was not called; and the only question that we have to consider is whether the chairman of quarter sessions had a right to comment on his absence from the witness-box. It seems to me that he undoubtedly had that right. There is nothing in the Act that takes away or even purports to take away the right of the Court to comment on the evidence in the case, and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case; and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what those comments should be. There are some cases in which it would be unwise to make any such comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge; and it is only necessary now to say that

(1) L. R. 2 C. C. 128.

1898

REG. v. RHODES.

that discretion is in no way affected by the provisions of the Criminal Evidence Act, 1898.

For these reasons, I think that the conviction must be affirmed.

WILLS J. I am of the same opinion; and I only wish to say a word as to the question of the admissibility of the evidence. In all cases of this kind it seems to me important to consider the exact nature of the charge, and the circumstances which must be given in evidence in order to support that charge. The charge here was that the prisoner falsely pretended that he was carrying on an honest business when in reality he was carrying on a bogus business. Now, how can such a charge be made out where a man has some of the apparatus of a man carrying on a real business, and where his possession of those appliances is a material element in the machinery of fraud? The fact that his business is a bogus business can only be shewn by giving evidence of transactions of a similar character. I do not see how the carrying on of a bogus business can be proved in any other way. If the transactions sought to be given in evidence had been prior to the offence charged, and within a reasonable period of time, it is clear that they would have been admissible. What difference does it make if they were immediately after the act complained of? If they formed part of the same system of fraud, I think it can make no difference. The only difficulty in this case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only nexus between such transactions is their proximity in point of time. That, however, is not the case here, and, had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote. But when it appears that the same advertisement continued to appear down to the last transaction, and that it operated in the last case exactly as it did in the case on which the charge was based, then, as it seems to me, both in law and in common sense, the evidence becomes admissible.

I feel myself no doubt whatever as to its admissibility; and I

am glad that by our judgment no doubt will be thrown on the question.

WRIGHT J. I am of the same opinion, but solely on the ground stated by my Lord, that it was an express part of the charge that the prisoner falsely pretended to be carrying on a genuine business, whereas in fact it was a bogus business. It was an essential part of the proof to shew that it was a business of that character, and the best evidence of this would be that it was carried on in the same manner for a considerable time. When once the continuity of the business was shewn, transactions after the date of the alleged particular crime were as relevant in proof of its general character as transactions before that date. As to the length of the interval of two months, it seems to me that the length of time greatly detracts from the value of such evidence; but I cannot say that it makes it legally inadmissible.

BRUCE J. I am of the same opinion; but I must say that I entertained much doubt during the course of the argument as to the admissibility of such evidence, and I do not think that such evidence, even if admissible, ought to be pressed. It is only relevant as tending to shew that the business was a sham business, and it ought not to be used in any other way. It has a remote bearing, but I cannot say that it has no bearing on that aspect of the case.

DARLING J. concurred.

Solicitor for prosecution: *E. E. Ruston, Chatteris.*

A. P. P. K.

C. A.
1898
Oct. 29;
Nov. 8.

[IN THE COURT OF APPEAL.]

HUBBUCK & SONS, LIMITED *v.* WILKINSON, HEYWOOD & CLARK, LIMITED.

Libel—Disparagement of Goods—Comparison of Plaintiff's Goods with those of Defendant—Cause of Action—Order xxv., rr. 2, 4.

H., a manufacturer of zinc paint, by his statement of claim alleged that the defendant W. was "falsely and maliciously" publishing in China and Japan copies of a report of experiments testing the zinc paints of H. and W., in which report the experimenter certified that W.'s paint had a slight advantage over H.'s, but that for all practical purposes they could be regarded as equal. The statement of claim went on to allege that the report, and each statement in it, was untrue, that H.'s paint was not equal or inferior, but superior to W.'s, and that H. had by reason of the premises been injured in his business and credit. W. applied to strike out the statement of claim as shewing no reasonable cause of action. The master made an order for striking out the statement of claim unless within a limited time H. amended it by alleging special damage with full particulars. Kennedy J. discharged this order:—

Held, on appeal, that a statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause of action; that the allegation that the statement was made maliciously could not convert a statement primâ facie lawful into one primâ facie unlawful; that the allegation and proof of special damage would not improve the plaintiff's case; and that judgment in the action must be entered for the defendant under Order xxv., r. 4.

This was an appeal by the defendants from an order of Kennedy J. discharging an order of a master striking out a statement of claim unless the plaintiffs amended by alleging special damage.

The allegations of the statement of claim were: (1.) That the plaintiffs had for many years carried on business as oil merchants and paint manufacturers, and that the defendants carried on a similar business. (2.) That the plaintiffs had for many years carried on a large business in the export of white zinc to the East, particularly China and Japan. (3.) That about April, 1898, the defendants, "contriving and intending to injure the plaintiffs in their said business falsely and maliciously caused to be printed and published and issued in

China and Japan, and continued the publication and issue of, a circular containing of the plaintiffs, and of them as such manufacturers and sellers of the said white zinc, and of them in the way of their business, the words following: 'Copy of a report of a trial of Bell Brand Genuine White Zinc' (meaning the white zinc manufactured and sold by the defendants) 'in comparison with Hubbucks' Patent White Zinc' (meaning the plaintiffs' said white zinc, and meaning that the defendants' white zinc was genuine, but that of the plaintiffs' was not genuine) 'by Fred and T. Thorne, builders and decorators, 266, Manchester Road, Cubitt Town, London, E. Paint-covering experiments. The under-mentioned experiments were conducted at Storer's Wharf, Poplar, London, under our supervision, and we certify that the particulars hereunder given are correct in every detail.'" (The report then gave particulars of the mode of comparison of the two paints, and concluded as follows:—) "'Exactly nine pounds of paint were used in each case, and each coat took the same quantity of paint. Judging the finished work, it is quite evident that W. H. & Co.'s zinc has a slight advantage over Hubbucks', but for all practical purposes they can be regarded as being in every respect equal.

'(Signed) Fred & W. T. Thorne.'

'I certify the above to be a copy of the original report. W. D. Graham, manager of Wilkinson, Heywood & Clark, Limited (Proprietors of David Storer & Sons, Praya Central, Hong Kong).'"

"(4.) By the said words the defendants meant that the white zinc of the defendants was superior to that of the plaintiffs, or that it was at least equal thereto at a much cheaper price, and that the white zinc of the plaintiffs was adulterated and not genuine, and that persons purchasing white zinc from the plaintiffs would do better by purchasing that of the defendants."

"(5.) The said report was untrue, and each statement thereof was untrue, and the alleged trials had not been made, or not fairly made, or made with the alleged results."

"(6.) The white zinc of the plaintiffs is in fact superior to that of the defendants, and not of an inferior or equal quality."

C. A. 1898

HUBBUCK & SONS v. WILKINSON, HEYWOOD & CLARK.

"(7.) The plaintiffs have by reason of the premises been much injured in their trade and business, and the reputation of their said white zinc and of themselves as the manufacturers thereof has been much injured; and the plaintiffs have been injured in their credit, and have been prevented from acquiring the profits which they might and otherwise would have acquired by reason of the said libel."

The plaintiffs asked for damages, and a perpetual injunction to restrain the defendants from further publishing "the said libel," or further libelling the plaintiffs as manufacturers, or their business.

The defendants took out a summons under Order xxv., r. 4, to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action. Master Manley Smith ordered that it should be struck out unless the plaintiffs amended it by averring special damage with full particulars in four calendar months.

The defendants appealed against this order, asking that the statement of claim might be simply struck out. The plaintiffs also appealed, seeking to have the order discharged. Kennedy J. dismissed the defendants' appeal, and discharged the master's order, but gave leave to appeal. The defendants appealed.

Moulton, Q.C., and *Montagu Lush*, for the appeal. *White* v. *Mellin* (1) is a direct authority that an action will not lie for a false statement disparaging a trader's goods, if no special damage is occasioned; and in that case *Evans* v. *Harlow* (2), where the same doctrine was laid down, was referred to with approbation. But in this case, even if special damage were alleged, no action would lie, for there is here no disparagement beyond the comparison of the plaintiffs' zinc with that sold by the defendants. This proposition is supported by the observations of Lord Herschell in *White* v. *Mellin*. (3) He says that *Evans* v. *Harlow* (2) was not decided solely on the ground that there was no allegation of special damage; and he dwells on the mischief which would arise if a statement by a trader that

(1) [1895] A. C. 154. (2) (1844) 5 Q. B. 624.
(3) [1895] A. C. 164, 165.

his goods were better than those of another trader were held to confer a right of action on the latter. *Young* v. *Macrae* (1) supports the same view. As to the use of the word "genuine," it is a part of the trade description of the defendants' goods, and does not insinuate that the plaintiffs' white zinc is not genuine. There is, therefore, no possible ground for saying that they have disparaged the plaintiffs as traders.

Lawson Walton, Q.C., *Norman Craig*, and *Oliver Hodges*, for the plaintiffs. It is a question for a jury whether the circular was not intended to libel the plaintiffs as makers of the goods. The plaintiffs can prove that the defendants have recently introduced the word "genuine," evidently meaning to insinuate that the paint with which they are competing is not genuine. In *British Empire Type Setting Co.* v. *Linotype Co.* (2) it was left to the jury to say whether the words complained of were a disparagement of the plaintiffs' machines which would not be actionable without special damage; or a disparagement of the plaintiffs as makers of them which would be actionable per se. The case therefore ought not to be withdrawn from a jury. The main question is, what impression would this circular produce upon Chinese or Japanese tradesmen? The disparagement of goods with special damage gives a right of action: *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (3) In *Ratcliffe* v. *Evans* (4) the statement complained of was that the plaintiff had discontinued his business, and this, supported by proof of a general loss of business, was held to give a good cause of action, though no loss of particular customers was shewn. The allegation of damage there was very similar to that made by the plaintiffs, and did not allege special damage. It is for a jury to say whether this is not a reflection on the plaintiffs as in the type-setting case; and further, if it is not an imputation on the plaintiffs, it is a depreciation of their goods with a sufficient allegation of damage.

Moulton, Q.C., in reply. If the question should be held to turn on the implication of an innuendo from the use of the

(1) (1862) 3 B. & S. 264.
(2) (1898) 79 L. T. 8.
(3) (1874) L. R. 9 Ex. 218.
(4) [1892] 2 Q. B. 524.

C. A. 1898

HUBBUCK & SONS v. WILKINSON, HEYWOOD & CLARK.

word "genuine," the defendants will ask to be allowed to prove that this word has been a part of the usual description of their goods for twenty years. It would be hard that a costly action should be tried on a point which, when the facts are known, could not possibly give a cause of action. Nobody reading the defendants' circular could take "genuine" for anything but a part of their trade description. Then, as to the substance of the case, *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1) is overruled by *White* v. *Mellin.* (2) Can a circular which states the plaintiffs' paint to be about as good as that sold by the defendants give the plaintiffs a cause of action? There is no disparagement of the plaintiffs' goods, but only a comparison of them with those sold by the defendants; and if an action will lie on that ground, every report by an engineer comparing different kinds of iron would give a cause of action. The report says that the plaintiffs' paint is practically as good as that sold by the defendants: so how can the defendants be said to insinuate that theirs is not genuine? The House of Lords in *White* v. *Mellin* (2) were evidently prepared to decide, if it had been necessary, that a comparison by a trader of his goods with those of another trader is not a disparagement such as to give a cause of action. A man may lawfully say that his goods are better than those of other people.

Cur. adv. vult.

1898. Nov. 8. LINDLEY M.R. now delivered the judgment of the Court (Lindley M.R., and Chitty and Vaughan Williams L.JJ.):—

This is an appeal by the defendants from the refusal of Kennedy J. to strike out the plaintiffs' statement of claim on the ground that it discloses no reasonable cause of action. [The Master of the Rolls then read the material parts of the statement of claim.]

The application is made under Order XXV., r. 4. Order XXV. abolished demurrers and substituted a more summary process

(1) L. R. 9 Ex. 218. (2) [1895] A. C. 154.

for getting rid of pleadings which shew no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order xxv., r. 2; the other is to apply to strike out the statement of claim under Order xxv., r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases. The authorities collected in the Annual Practice shew that the Courts have always so construed rule 4, although sometimes, no doubt, a statement of claim may be so long and the facts so complicated that considerable time and attention are required to ascertain their true result, as in *Republic of Peru* v. *Peruvian Guano Co.* (1) If in this case it were necessary, in order to justify us in striking out the statement of claim, to come to the conclusion that *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (2) was not law, and was in effect overruled by *White* v. *Mellin* (3), we should be of opinion that the question raised was too difficult and important to justify the Court in summarily striking out the claim. But it is not necessary to consider any such question. The truth is that the defendants' circular when attentively read comes to no more than a statement that the defendants' white zinc is equal to, and, indeed, somewhat better, than the plaintiffs'. Such a statement, even if untrue and the cause of loss to the plaintiffs, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not enough to convert what is primâ facie a lawful into a primâ facie unlawful statement. It is not unlawful to say that one's own goods are better than

(1) (1887) 36 Ch. D. 489. (2) L. R. 9 Ex. 218.
(3) [1895] A. C. 154.

C. A. 1898

HUBBUCK & SONS v. WILKINSON, HEYWOOD & CLARK.

Lindley M.R.

other people's; and *Allen* v. *Flood* (1) shews that malice in such a case is immaterial. The fact that the defendants call their white zinc genuine, and contrast it with the plaintiffs' patent white zinc which is not called genuine, is relied upon by the plaintiffs as shewing that the circular is or may be fairly regarded as a defamatory libel on the plaintiffs—i.e., a libel on them in the way of their trade. But when the whole circular is looked at, and it is found that the defendants state that for all practical purposes the two contrasted paints are in every respect equal, it is impossible to treat the circular as anything more than a disparagement of the white zinc paint made and sold by the plaintiffs. No ingenuity can convert the circular into a defamatory libel on the plaintiff company; and if the action went to trial it would be the duty of the judge to tell the jury that no question of libel on the plaintiffs had to be considered.

We will now consider the circular in its other aspect, namely, as a disparagement of the plaintiffs' goods. From this point of view the case is undistinguishable from *Evans* v. *Harlow* (2) and *Young* v. *Macrae* (3), where malice, falsehood, and damage were all alleged, and yet it was held that what the defendant there published was not actionable. The ground of the decision in both cases was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals is not actionable. The principle laid down in these cases has never been questioned, and it has been emphatically approved in *White* v. *Mellin*. (4) The defendants in this case give the results of some experiments with the two sorts of paint, and in paragraph 5 of the statement of claim the plaintiffs say that the report of the experiments is untrue, and that the trials were not fairly made. But, supposing this to be the case, the result is not altered. Paragraph 5 merely states more particularly what has been already stated before in paragraph 3, where the general charge of falsehood is made. Even if each particular charge of falsehood is established, it will only come to this—that it is untrue that the defendants' paint is better than or equal to

(1) [1898] A. C. 1.
(2) 5 Q. B. 624.
(3) 3 B. & S. 264.
(4) [1895] A. C. 154.

that of the plaintiffs, for saying which no action lies. The particular reasons for making that statement are immaterial if the statement itself is not actionable. The statement of claim, then, as it stands, shews no reasonable cause of action; and the only other question is whether the plaintiffs should have liberty to amend by stating special damage as distinguished from general damage. In *Evans* v. *Harlow* (1) all the members of the Court agreed that the declaration shewed no cause of action. Patteson J., however, went on to say that an action for disparaging the plaintiff's goods would not lie unless the plaintiff alleged that by reason of the disparagement he had been prevented from selling his goods to some particular person. But in *Young* v. *Macrae* (2) it was pointed out that there were different ways of disparaging a man's goods—that some false statements about them might be actionable if special damage could be proved, and *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (3) was decided on this ground. But in *Young* v. *Macrae* (2) it was also pointed out that, if the only false statement complained of is that the defendant's goods are better than the plaintiff's, such a statement is not actionable, even if the plaintiff is damnified by it. The judgments of Cockburn C.J. and of Wightman J., who was a party to the decision in *Evans* v. *Harlow* (1), are clear upon this point. Lord Herschell expressed himself very emphatically to the same effect in *White* v. *Mellin* (4), and he expressed his clear opinion that it could make no difference whether a defendant said that his goods were better than the plaintiff's generally, or whether the particulars in which the plaintiff's goods were said to be inferior were specified. He pointed out with great force that, if actions in such cases were held to lie, the Courts would be constantly engaged in trying the respective merits of the goods of rival traders, and the pernicious practice of bringing actions for mere purposes of advertising would be greatly encouraged: See also *British Empire Type Setting Co.* v. *Linotype Co.* (5) The present plaintiffs' case would not, therefore, be

(1) 5 Q. B. 624.
(2) 3 B. & S. 264.
(3) L. R. 9 Ex. 218.
(4) [1895] A. C. 164–5.
(5) 79 L. T. 8.

C. A. 1898

HUBBUCK & SONS v. WILKINSON, HEYWOOD & CLARK.

Lindley M.R.

improved by the allegation and proof of actual loss. In other words, compliance with the master's order requiring more definite allegation of special damage would not improve the plaintiffs' case. The plaintiffs do allege actual loss attributable to the defendants' circular; and, if proof of such loss would enable the plaintiffs to maintain their action, it would be wrong summarily to strike out their statement of claim, although it might have been open to a demurrer before the Judicature Acts: see on this point *Ratcliffe* v. *Evans*. (1) We regard this case as falling within the principle established by *Evans* v. *Harlow* (2), *Young* v. *Macrae* (3), and *White* v. *Mellin*. (4) It is not necessary to consider how the case would have stood, if the defendants had not been rival traders simply puffing their own goods and comparing theirs with those of the plaintiffs. If the defendants had made untrue statements concerning the plaintiffs' goods beyond saying that they were inferior to, or, at all events, not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right summarily to strike out the statement of claim as shewing no reasonable cause of action. But the circular complained of is such as plainly to constitute no cause of action even if all the allegations in the statement of claim are true. Under these circumstances the appeal must be allowed, with costs here and below; and, as there is no reason to suppose that the plaintiffs can improve their case by any amendments they can make, the Court ought to exercise the power conferred upon it by Order XXV., r. 4, and order judgment to be entered for the defendants.

Appeal allowed.

Solicitors: *Johnson, Weatherall & Sturt; Fullilove & Co.*

(1) [1892] 2 Q. B. 524.
(2) 5 Q. B. 624.
(3) 3 B. & S. 264.
(4) [1895] A. C. 154.

H. C. J.

KITCHEN, APPELLANT; JOHNSON, RESPONDENT. 1898 *Nov.* 10.

Parliament — Franchise — Registration — Borough Vote — Description of Qualifying Property — Power to Amend — Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 13.

The claimant for a borough vote entered by mistake in the fourth column of his notice of claim, as the description of qualifying property, 202, Gordon Road and 31, Monk Street. It was proved that he had occupied 202, Gordon Road and 33, Monk Street in immediate succession for the qualifying period, and the revising barrister altered 31 into 33, and allowed the claim :—

Held, that the revising barrister had power to make the amendment.

CASE stated by the revising barrister for the city of Nottingham.

At a court held for revising the lists of voters for the city of Nottingham, notice of intention to oppose the claim of Ernest Dann to have his name inserted in Division I. of the occupiers' list of electors for the parish of Nottingham in the said city was duly given by the appellant.

It was proved that Ernest Dann had duly given notice of his claim to have his name inserted in Division I. of the said list.

The entry relating to Ernest Dann in the list of claimants and in the notice of claim received by the overseers was as follows :—

Name.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Dann, Ernest	31, Monk Street.	Houses in succession.	202, Gordon Road and 31, Monk Street.

The evidence established that Ernest Dann had occupied as tenant No. 202, Gordon Road and No. 33, Monk Street in immediate succession during the qualifying period; that he had authorized a political agent to fill in a form of claim for him, and had given the particulars of the qualifying property correctly to such agent; that a clerk of such agent, in filling in the claim, instead of describing the qualifying property in Monk

1898

KITCHEN v. JOHNSON.

Street as No. 33, in accordance with the particulars furnished, as he intended to do, by mistake described it as No. 31 in the second and fourth columns of the claim; that Ernest Dann subsequently signed the claim without observing the mistake in the description; that Nos. 31 and 33, Monk Street are adjoining houses, and that any communications or inquiries for Ernest Dann sent to or made at No. 31 would have reached him at No. 33.

It was contended that the description of the qualifying property in the claim was inapplicable to the house occupied by Ernest Dann, and that the revising barrister had no power to amend the fourth column by substituting No. 33 for No. 31. The revising barrister held that, in substituting No. 33, Monk Street for No. 31, he was not changing the description of the nature of the qualification, but was only changing the description of the qualifying property. He accordingly amended the second and fourth columns by substituting No. 33, Monk Street for No. 31, and allowed the claim. (1)

W. Graham, for the appellant. The revising barrister had no power to make this amendment. It was against the express terms of s. 28, sub-s. 13, of the Act of 1878, since it changed the description of the qualification. The claim was in respect of occupation of 31, Monk Street, which the claimant had never occupied, and the occupation of which in fact constituted the qualification of some other person. The only means by which the mistake could have been rectified was by a declara-

(1) By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, "A revising barrister shall, with respect to the lists of voters for a parliamentary borough and the burgess lists for a municipal borough which he is appointed to revise, perform the duties and have the powers following:—

"(1.) He shall correct any mistake which is proved to him to have been made in any list.

"(2.) He may correct any mistake which is proved to him to have been made in any claim or notice of objection."

"(13.) Except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be; nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same."

tion made under s. 24: *Foskett* v. *Kaufman*. (1) In *Bendle* v. *Watson* (2), where it was held that a revising barrister might have amended, it was expressly said that this was only on the ground that in doing so he would have described no new qualification; he could only amend by inserting the altered description of the same qualification. In the present case the alteration from 31 to 33 was describing a new qualification. [He referred to *Soutter* v. *Roderick* (3) and *Hurcum* v. *Hilleary*. (4)]

Appleton, for the respondent. The revising barrister had power to amend. Sub-s. 13 only forbids an alteration in the legal nature and character of the qualification, as, for instance, where a freehold is changed into an occupation qualification. That, no doubt, cannot be altered unless a declaration has been made under s. 24: *Foskett* v. *Kaufman* (1), or unless the alteration be only for the purpose of more clearly and accurately defining the qualification. Here the revising barrister has only altered the fourth column—the description of the qualifying property. He is not prevented from doing so by sub-s. 13, but has a right to do so by sub-s. 2. That is clear both from *Bendle* v. *Watson* (2) and from the Irish cases which were decided on a similar section in the Irish Act of Parliament: *Short* v. *Daly* (5); *Hanbridge* v. *Beveridge* (*Donnelly's Case*) (6); *Holland* v. *Chambers* (*M'Clafferty and Toland's Case*). (7)

Even if it should be held that the alteration from 31 to 33 was changing the description of the qualification, the revising barrister was right under sub-s. 13 in amending, since he did so for the purpose of more clearly and accurately defining the same. Where it is proved that the claimant has occupied a house in a street during the qualifying period, and that house is identified as the house in respect of which he intended to claim, the revising barrister may correct, under sub-s. 2, a mistake which has been made in the number.

W. Graham replied.

(1) (1885) 16 Q. B. D. 279.
(2) (1871) L. R. 7 C. P. 163.
(3) [1896] 1 Q. B. 91.
(4) [1894] 1 Q. B. 579.
(5) (1891) 1 Lawson's Registration Cases (Irish) 310.
(6) (1889) 1 Lawson's Registration Cases (Irish) 303.
(7) (1894) 3 Lawson's Registration Cases (Irish) 40.

1898.

KITCHEN v. JOHNSON.

LORD RUSSELL of KILLOWEN C.J. It is impossible to say that this case is free from doubt; but I have come to the conclusion that the revising barrister was acting within his jurisdiction in doing what he did.

The question arises as to the amendment of a notice of claim and of a list of claimants. It appears that one Ernest Dann had duly given notice of his claim to be inserted on the occupiers' list, and that the entry both in the notice of claim and in the list of claimants gave, under the head "Nature of Qualification," "Houses in succession," and under the head "Description of Qualifying Property," "202, Gordon Road and 31, Monk Street." It was proved that Dann had occupied, as tenant for the qualifying period, 202, Gordon Road and 33, Monk Street in immediate succession; and the question that we have to decide is whether the revising barrister had power to amend the list by substituting 33 for 31. The case finds that 31 and 33 are adjoining houses, and that any communication or inquiries sent to Dann at 31 would have reached him at 33. That is not wholly immaterial as affecting the discretion of the revising barrister to amend if he had jurisdiction to do so. Had he, then, jurisdiction to make this amendment? The reply to that question turns on the construction of s. 28 of the Act of 1878. By sub-s. 1 the revising barrister "shall correct any mistake which is proved to him to have been made in any list." The reason of that imperative amendment is obvious. The list is ministerially made up by the overseers, and is not a list in which the claimants have any act or part, and the voters on those lists ought not to be prejudiced by any errors made by purely ministerial officers.

Then, by sub-s. 2, "He may correct any mistake which is proved to him to have been made in any claim or notice of objection." A claim or notice of objection is the act of a person who is primâ facie responsible for any mistakes he makes, and the revising barrister has therefore a discretion, and is no longer compelled to amend. Sub-s. 2 must, however, be read with sub-s. 13, which enacts in substance that, "except as herein provided," the revising barrister shall not be at liberty to change the description of the qualification as it appears in

the list except for the purpose of more clearly and accurately defining the same. The Court of Appeal in the case of *Foskett* v. *Kaufman* (1) decided that those words, "except as herein provided," referred to s. 24, which gives power to a voter who is entered on any list of voters for a municipal borough, and whose name or place of abode, or the nature of whose qualification, or the name and situation of whose qualifying property is not correctly stated in such list, to make a declaration rectifying the mistake. I do not think, however, that that decision throws any material light on the question with which we have to deal, because it is plain that s. 24 applies equally to a mistake in any of the four columns, and the effect of that section is simply to enable a person who finds that there is a mistake in the manner in which he is entered on the list to correct that mistake by a declaration in due form, the result of which will be that he will not be required to attend the revision court unless he is called upon by a proper notice of objection to come and support his right to be on the list at all.

I do not now deal with the manner in which the discretion of the revising barrister to amend should be exercised, if he has such discretion. Here it is clear that there was a mistake, and that but for that mistake the claimant would rightly be placed on the list of voters as entitled to vote in respect of his successive occupation of 202, Gordon Road and 33, Monk Street. It is contended that the revising barrister had no power to make the amendment because the claimant was unable to prove his claim as made, since he was not the occupier of 31, Monk Street for the qualifying period or at all, and it is said that the amendment would therefore be an alteration of his qualification, such as is expressly forbidden to be made by sub-s. 13 of s. 28. If that argument is good, it takes out of the general power of amendment given by sub-ss. 1 and 2 any case in which the amendment has the effect of altering either the qualification or the description of the qualifying property of the claimant. What, then, is the meaning of the phrase in sub-s. 13 of s. 28, "description of the qualification"? It seems to me that it is not the same as "description of qualifying

(1) 16 Q. B. D. 279.

1898

KITCHEN v. JOHNSON.

Lord Russell C.J.

property." "Qualification" means, I think, the legal nature and character of the qualification, and the revising barrister has no right to amend these. He cannot, for instance, alter simple occupation into successive occupation, nor turn a residential qualification into a business qualification; but he is not prevented from amending the description of the property in respect of which the qualification arises. That seems to me clear from the headings of the four columns of the list: "Name," "Place of Abode," "Nature of Qualification," "Description of Qualifying Property." The revising barrister has no power to alter the third column except, as I have said, where there has been a declaration under s. 24; but he can amend the fourth column, and I think that he ought to exercise that power where a bonâ fide mistake has been made. The case of *Foskett* v. *Kaufman* (1) seems to me to afford an apt illustration of the distinction which I have sought to draw between qualification and qualifying property. In that case, as in this, no declaration under s. 24 had been made, and the qualification of the voter appeared on the list as "dwelling-house," and the name and situation of qualifying property as 5, Victoria Cottages. It appeared that his qualification was in reality for the successive occupation of dwelling-houses in succession at High Street, Wapping, and 5, Victoria Cottages, and that he had not occupied the latter alone for a sufficient qualifying period. The Court held that the barrister had no power to amend the list, because, if he had done so, it would have been an attempt to change the description of his qualification from that for a dwelling-house to that for dwelling-houses in succession, which was forbidden by sub-s. 13 of s. 28.

The case of *Bendle* v. *Watson* (2) is to the same effect although the facts were different, and also the section on which that case was decided. There a county voter was rightly placed on the register in respect of a house numbered 4 in a certain street. Subsequently the numbering of the street was altered by a competent authority, and the voter's house became No. 9, another house in the street becoming No. 4. The Court held that the revising barrister had power to amend the description

(1) 16 Q. B. D. 279. (2) L. R. 7 C. P. 163.

1898

KITCHEN v. JOHNSON.

Lord Russell C.J.

of the voter's house from No. 4 to No. 9. Willes J. says (1): "If we could see here that there was an attempt to introduce a qualification other than that intended to be described by the language used on the register, the case would be different." That, as it seems to me, is the key to that decision.

Here there has been no attempt to describe a qualification different from that intended to be described in the claim. Every one interested in the matter would know what it was that was in fact intended to be described in the claim.

As to the Irish cases which have been cited, so far as the point now under discussion is concerned, the statute on which they were decided is in similar language to that now before us, and those cases, therefore, seem to me to be distinctly in point.

For these reasons I think that the revising barrister was right, and that this appeal must be dismissed.

I will only add that if I were driven to the second head of the argument for the respondent—namely, that if, in making the amendment, he did change the description of the qualification, he only did so for the purpose of more clearly and accurately defining the same—I should require further consideration before I based my judgment on that ground. I prefer to base my judgment on this: that the amendment by the revising barrister was not one affecting an alteration in the legal qualification of the claimant at all.

WILLS J. I am of the same opinion, and I do not wish to add anything to what my Lord has said.

LAWRANCE J. I also agree in the conclusion arrived at.

Appeal dismissed. Leave to appeal granted.

Solicitors for appellant: *Goldring & Philips, for Berryman, Nottingham.*

Solicitor for respondent: *Sir S. G. Johnson, Town Clerk, Nottingham.*

(1) L. R. 7 C. P. at p. 168.

A. P. P. K.

1898
Nov. 11.

PRESCOTT *v.* LEE.

Parliament—Borough Vote—Notice of Objection—Mistake—Power of Amendment—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 18—*Registration Order*, 1895.

The mistakes in notices of objection which a revising barrister is empowered to correct under s. 26 of 41 & 42 Vict. c. 26, include mistakes of law (Wills J. dissenting).

In a notice of objection to the retention of a person's name on the occupiers' list of voters in a borough, the objector described himself as "on the list of parliamentary electors and burgesses" for a certain parish in the borough, but incorrectly inserted as his place of abode his shop, which was his qualifying property, and at which, though he spent the greater part of the day there, he did not reside. His reason for so doing was that his shop was situate in the borough, and his place of abode was at some distance from the borough, and he thought he ought to give his address within the borough. No one was misled by the misstatement:—

Held, by Lord Russell of Killowen C.J. and Lawrance J. (Wills J. dissenting), that the misstatement of the place of abode was a mistake which the revising barrister had power to amend.

CASE stated by the revising barrister for the borough of Strand.

At a court held for the revision of the lists of voters for the parliamentary borough of Strand, Francis C. Hunt objected to the name of Thomas Prescott being retained on Division I. of the general occupiers' list of voters for the parish of St. Martin-in-the-Fields in the said borough.

The objection was good in substance and was duly served and was correct in form, except that the place of abode of the objector was incorrectly given. The objection was signed "Francis C. Hunt, of 106, Drury Lane." The objector's true place of abode was 50, Nelson Road, Wimbledon, and not 106, Drury Lane. The address 106, Drury Lane was inserted by a mistake on the part of the objector, who thought that he ought to give his address within the borough, and not an address outside the borough. The address 106, Drury Lane was the objector's qualifying property in the borough, and was a shop in which he could be found the greater part of every

week-day. The objector's place of abode was stated in the 2nd column of the overseer's list as 50, Nelson Road, Wimbledon. Neither the said Thomas Prescott nor any one else was affected in any way by the incorrect statement of the objector's place of abode.

The revising barrister amended the objection by adding the words "and of 50, Nelson Road," and he struck out the name of Thomas Prescott from the list subject to a case for the opinion of the Court.

W. Graham, for the appellant. The revising barrister had no power to amend. The Registration Order, 1895, which is of statutory force, and which now alone regulates the registration procedure, provides that "the instructions, precepts, notices, and forms in the schedule to this order shall be observed and be valid in law." The observance of the form is imperative. Any departure from it is fatal. The form of notice of objection is given in Sched. III., Form I. And, according to that form, the objector must sign as follows: "A. B. (*place of abode*) on the list of parliamentary electors and burgesses, *or* county electors (*or on the one or the other*) for the parish (*or* township) of———." By s. 18 of the Registration Act, 1885, it was provided that a disregard of the forms contained in the schedules to that Act should not invalidate any notice. In March, 1895, the Queen in Council, by the Registration Order, 1895, made under the powers conferred by the County Electors Act, 1888 (51 & 52 Vict. c. 10), s. 13, and the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 76, sub-s. 7, substituted the present forms for the forms then in use, and required that those new forms should be observed. It may be that so long as s. 18 of the Act of 1885 remained unrepealed the provision of the Order as to the observance of the new forms was to be read as qualified by the proviso at the end of s. 18. But by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), s. 18 of the Act of 1885 was repealed, and it must be presumed that that repeal was intentional. From that date the qualification is gone, and the observance of the new forms is absolutely obligatory. Secondly, the

1898

PRESCOTT v. LEE.

statement that 106, Drury Lane was the objector's place of abode was not a "mistake" within the meaning of s. 28 of the Parliamentary and Municipal Registration Act, 1878. The objector did not insert one address by mistake for another: he intended to give the address which he in fact gave. His mistake was in his reasons for giving it. In other words, he made a mistake of law. But the Act was intended to allow of the amendment only of mistakes of fact. In *Smith* v. *Chandler* (1), where a notice of a claim by a lodger omitted to give the date of the attestation as required by the form, it was held that the barrister had no power to amend. And one of the reasons given by Lord Coleridge C.J. for his decision was that "The omission was not due to a mistake. It was, as he (the revising barrister) knew, deliberately made."

Lawless, for the respondent. The repeal of s. 18 of the Registration Act, 1885, was not intended to affect the construction to be put upon the language of the Registration Order, 1895, as to the requirement of observance of the forms. The object of the form of notice of objection was to let the person objected to know where the objector was to be found. But here, though the notice as it stood was informal and insufficient, it gave the necessary information, for he was to be found at his shop; and further, by reference to the list of parliamentary voters on which his place of abode would be found, it indirectly stated where he resided; and that was sufficient to give the barrister jurisdiction to correct the informality. This was a mistake within the meaning of the Act of 1878. In *Adams* v. *Bostock* (2), where the objector forgot to state any place of abode at all in his notice of objection, it was held that the omission was a mistake which the barrister could correct. But, if omission to state a place of abode at all can be a mistake within the Act, the insertion of a wrong place of abode may equally be a mistake, provided no person is misled thereby; and here the barrister has so found.

Graham, in reply, referred to *Humphrey* v. *Earle*. (3)

(1) (1888) 22 Q. B. D. 208. (2) (1881) 8 Q. B. D. 259.
(3) (1887) 20 Q. B. D. 294.

1898

PRESCOTT v. LEE.

LORD RUSSELL of KILLOWEN C.J. In this case I have the misfortune to differ from Wills J.; but having formed a definite opinion, I am bound to give effect to it. This is not a case in which the revising barrister has exercised his discretion (if he had one) by refusing to amend, and the Court are asked to override that refusal; the barrister has amended, and the Court are all agreed that if he had the power to do so he was under the circumstances perfectly right in exercising his discretion in the way he did. The question is whether he had that power. I think he had. By the Registration Act, 1885, s. 18, it was provided that "The forms and instructions contained in the second and third schedules to this Act shall be used and observed in all cases to which they apply . . . . but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." What was meant by that provision was that, though the Legislature intended to lay down rules for the purpose of insuring uniformity in proceedings under the Registration Acts, it at the same time intended that claims and objections which were otherwise valid should not be defeated by reason of their not strictly following the statutory forms. The Act did not require a slavish adherence to the forms. It was intended that the Court should not give effect to mere technical objections. On the other hand, it was obvious that too great laxity could not be permitted. A line had to be drawn somewhere. The question was where. I think that the line was properly drawn under that Act at a point where, although there was not a literal compliance with the forms, there was nevertheless a substantial compliance by imparting all the information which the party was required to give, and there was no attempt or intention to mislead. In such a case the barrister had power to amend, and ought to have amended. That was how the law stood under the Act of 1885. Under the County Electors Act, 1888 (51 & 52 Vict. c. 10), s. 13, and the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 76, sub-s. 7, power was given to the Queen in Council to alter the forms under the Registration of Electors Acts; and in pursuance of those powers the Registration Order, 1895, was made, by which, after reciting the necessity of

1898

PRESCOTT v. LEE.

Lord Russell C.J.

altering the forms, "it is hereby ordered that the former instructions, precepts, notices, and forms shall be altered accordingly, and that the instructions, precepts, notices, and forms in the schedules to this Order shall be observed and be valid in law." And in the form of notice of objection given in Form I. of Sched. III. to that order the notice is to be signed by "A. B. (*place of abode*) on the list of parliamentary electors and burgesses . . . . for the parish (*or* township) of ———." Then came the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), whereby s. 18 of the Registration Act, 1888, is repealed. And it is now contended that because of that repeal, and the omission to re-enact in the order the proviso that a disregard of the form shall not of itself invalidate the notice, a misstatement of the objector's place of abode is a fatal defect, and one which is outside the barrister's power of amendment. With that contention I cannot agree. The Statute Law Revision Act expressly provides that "the repeal of any words or expressions of enactment described in the said schedule shall not affect the . . . . . construction of any statute or of any part of a statute." And, accordingly, in a case decided yesterday (1), we held that we ought, notwithstanding the repeal of s. 18, to imply the proviso of that section in the construction of the Order of 1895, and that a notice of objection under the Order was not invalidated by a disregard of the form, provided it substantially satisfied the requirements of the form as to giving information, and did not and was not intended to mislead. Apart from the Revision Act, I should construe the Order of 1895 in the same way.

Then, if so, the question becomes a very narrow one. The revising barrister's power of amendment is determined by s. 28 of the Parliamentary and Municipal Registration Act, 1878, sub-s. 2 of which provides that "he may correct any mistake which is proved to him to have been made in any claim or notice of objection." If, then, the misstatement of the objector's place of abode was a mistake, he had jurisdiction to correct it. The question is whether it was a mistake. I will first consider that question apart from authority. The law is

(1) See *Linforth* v. *Butler*, post, p. 116.

that any person on any list of parliamentary voters may object to the retention of the name of any other person on any list of parliamentary voters for the same constituency. Here the objector was on a list of parliamentary voters for the borough of Strand, and as such was entitled to object. Upon the list there appeared against his name the place of his abode, and also his qualifying property, namely, his place of business. He then gave notice of objection in a form which was in all respects in accordance with the form given in Sched. III. to the Registration Order, 1895, except that he stated his place of business as his place of abode. The barrister finds that he did so under the mistaken belief that he ought to give his address within the borough; and he further finds that no one was affected by the incorrect statement. Therefore, you have got this—that the objector gave all the information to the voter objected to that the Order required, and that no one was misled. But it was said on behalf of the appellant that the objector's mistake was a mistake of law, not of fact, and that a mistake of law ought not to be corrected. I can see nothing in the Act to limit the barrister's power of correction to mistakes of fact. On principle, then, I think that the barrister had power to amend. Further, I am supported in this view by authority. In *Adams* v. *Bostock* (1) the respondent, who objected to the retention of the appellant's name on the list of voters for the borough of H., described himself in the notice of objection as "on the list of parliamentary voters for the parish of H.," but omitted to insert his place of abode. It appeared that he was well known in the borough and that there was no one else of the same name on the list of voters. He therefore gave the person objected to all the information he required. Under these circumstances, it was held that the omission to state the place of abode was a mistake which the barrister had power to amend. It was contended that the later case of *Smith* v. *Chandler* (2) impugns the authority of *Adams* v. *Bostock*. (1) But I think it does not. It seems to me to be an entirely different case. There the document which the barrister was asked to amend was a notice of

(1) 8 Q. B. D. 259. (2) 22 Q. B. D. 208.

1898

PRESCOTT v. LEE.

Lord Russell C.J.

claim by a lodger claimant—a form of claim which, unlike other claims, requires attestation, and also that the attestation shall be dated in order to establish its bona fides. The notice was attested, but the attestation was not dated. It was held that the barrister had no power to amend; and the ground of that decision seems to have been nothing more than that the date of attestation was essential to the validity of the notice. The omission there was material. In *Adams* v. *Bostock* (1) it was not. It is to be observed that *Adams* v. *Bostock* (1) was not there cited. On both principle and authority, therefore, I think that the revising barrister in the present case had jurisdiction to make the amendment which he did.

WILLS J. I need hardly say that it is with great reluctance that I differ from the Chief Justice. The question is a narrow one, but it is important. What does s. 28 of the Act of 1878 mean when it says that the barrister may correct any "mistake" in a claim or notice of objection? I think it is a mistake within that section if a man says one thing meaning to say another; but that it is not a mistake if he deliberately says a thing meaning to say it, although he has been induced to say it by erroneous reasoning. Here the barrister, no doubt, says that the address in Drury Lane was inserted by a mistake; but he goes on to explain what he meant by a mistake, namely, that the objector had made a mistake in the premises which led him to conclude that his business address was the proper one for him to give. I do not think that that was the kind of mistake to which the Act was intended to apply. In *Adams* v. *Bostock* (1) there was no question, as there is here, of a substitution of a different address for that which was given. The circumstances of that case, therefore, were entirely different, and I am not disposed to extend that decision to the facts of the present case. In my view, the revising barrister here had no jurisdiction to amend.

LAWRANCE J. I agree with my Lord that the appeal should be dismissed. The question is what is meant by the word "mistake." I think it includes the kind of mistake which has

(1) 8 Q. B. D. 259.

1898

PRESCOTT v. LEE.

Lawrance J.

been made in the present case. If the objector, while giving sufficient information as to where he is to be found, takes a wrong view of what he has to do in the matter of stating his place of abode, and the person objected to is not misled thereby, that I think may reasonably be called a mistake which the revising barrister is empowered to amend. I agree with what Lord Coleridge C.J. says in *Bollen* v. *Southall* (1) speaking of notices of objection: "With regard to the power of amendment, I am much indisposed to construe it so as to encourage laxity; but I think it would make it almost nugatory to hold that the revising barrister had not the power to amend or correct mistakes in these notices if the information they are intended to convey is really given, but given in an informal or inaccurate manner."

Appeal dismissed.

Solicitors for appellant: *Ayrton, Biscoe & Barclay.*
Solicitors for respondent: *Troutbeck & Co.*

J. F. C.

LLOYD JONES, APPELLANT *v.* MUNRO, RESPONDENT.

1898
Nov. 10.

Parliament—Franchise—Registration—Borough Vote—Duplicate Entries—Notice of Selection—Appeal from Revising Barrister—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 14.

The appellant, whose name was on the list of voters for a borough in respect of his place of abode, duly claimed to have it also inserted on the list in respect of his place of business, and gave to the revising barrister a notice of selection in proper form, selecting the entry of his place of business as the one to be retained for voting. The revising barrister allowed the claim, but held that at the time the notice of selection was given there was no duplicate entry on the list of voters to which the notice could apply, and he accordingly marked the entry in respect of the appellant's place of abode as the entry to be retained for voting:—

Held, that the revising barrister was right, and that no appeal lay from his decision.

CASE stated by the revising barrister for the city and county of Exeter.

"The appellant's name duly appeared in Division I. of the

(1) (1884) 15 Q. B. D. 461, at p. 466.

1898

JONES v. MUNRO.

occupiers in the parish of Saint Sidwell, in Saint David's Ward, Exeter, in the list of persons entitled to vote as parliamentary and municipal electors published by the overseers, as follows:—

Name of Elector in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Jones, Lloyd William .	5, Clifton Hill.	Dwelling-house.	Clifton Hill.

"This No. 5, Clifton Hill was the appellant's place of abode, and he was not a freeman, nor was his name on the list of freemen of the said city.

"The appellant duly made a claim to the overseers of the parish of St. Martin, in Saint Petrock's Ward, Exeter, to have his name inserted in the lists for that parish as a parliamentary elector and burgess in respect of the qualification below:—

Name of Claimant in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Jones, Lloyd William .	Clifton Hill.	Warehouse.	High Street.

"This claim was duly published, and it correctly appeared on what was called a list of claims for the parish to be on Division I. of the occupiers. The respondent, Hector John Munro, who was duly qualified as a voter, upon due notice, objected to the claim before me. Evidence on the appellant's behalf was adduced which I held was satisfactory, and I allowed the claim.

"The appellant had delivered a notice in writing to me at the opening of my first revision court on September 21 as follows:—

"'Notice of Selection.

"'City and County of Exeter.

"'To the Revising Barrister.

"'Pursuant to 41 & 42 Vict. c. 26, s. 28, sub-s. 14, I hereby give you notice that the entry I wish retained on the list of

voters now about to be revised for the city and county of Exeter is that in which my name occurs in a claim for Division I. in the parish of St. Martin. "'W. Lloyd Jones.

"'Sept. 16, 1898.'

"After his claim was allowed, the appellant applied to have the entry of his place of abode in the parish of St. Sidwell marked under the section mentioned in this notice with a note to the effect that he was not entitled to vote in respect of the qualification therein contained, he being on the list for voting in respect of another qualification. To this application the respondent objected on the ground that I had no authority by law to accede to it, and contended that the note should be placed against the entry of the claim. I was of opinion that at the opening of my first revision court, although the appellant's name appeared in what might be described as a catalogue of contingent claims, there was no duplicate entry in the list of electors to which Form P. of the Registration Order, 1895, Sched. III., could apply, and that the notice in writing which the appellant had delivered to me was not a valid notice of selection. Under the circumstances, I held that I had no discretion but to retain for voting the entry in respect of the appellant's place of abode in accordance with the Registration Act, 1885, s. 5, sub-s. 1 (*b*). I therefore, in pursuance of the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 14 (*a*), placed against the entry of the appellant's name in the list of claims which I had then allowed and initialled a note to the effect that the appellant was not entitled to vote in respect of the qualification therein contained, he being on the list of voters in respect of another qualification." (1)

(1) By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 14, "Where the name of any person appears to be entered more than once as a parliamentary voter on the lists of voters for the same parliamentary borough, or more than once as a burgess on the burgess lists for the same municipal borough, the revising barrister shall inquire whether such entries relate to the same person, and, on proof being made to him that such entries relate to the same person, shall retain one of the entries for voting, and place against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification therein contained for the parliamentary borough or for the municipal

1898

JONES v. MUNRO.

Coldridge, for the appellant.

[LORD RUSSELL of KILLOWEN C.J. The first question seems to be whether there is any right of appeal in such a case.]

The right of appeal is given by the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), s. 42, which allows an appeal from the revising barrister's decision on points of law to any person (inter alios) whose name shall have been expunged from any list. In this case the revising barrister has in effect expunged the appellant's name from the list. *Reg.* v. *Revising Barrister for Liverpool* (1) is distinguishable, since that case merely decided that there is no appeal as to the sufficiency of a notice of selection. The decision of the revising barrister here has deprived the appellant of an effective right to vote; and although the particular circumstances were not in contemplation when the Act of 1843 was passed, s. 42 is in sufficiently wide terms to give a right of appeal in this case.

The notice of selection was valid, and the revising barrister ought to have given effect to it. There is nothing in s. 28, sub-s. 14, of the Act of 1878 fixing the time at which the name must appear to be entered more than once. As soon as the revising barrister had allowed the claim the sub-section, and consequently the notice of selection, came into operation.

By s. 4, sub-s. 5, of the Registration Act, 1885, the revising barrister is empowered to treat the list of claimants as if it were a list of voters, and the effect of that is to give in this case a duplicate entry at the sitting of the first revision court, one being on the list of voters, and one on the list of claimants.

Foote, *Q.C.*, and *Phillpotts*, for the respondent, were not called upon to argue.

---

borough, as the case may be, he being on the list for voting in respect of another qualification. Any such person may, by notice in writing delivered to the revising barrister at the opening of his first revision court, select the entry to be retained for voting, and in making such selection may select one entry to be retained for voting for the parliamentary borough, and another entry to be retained for voting as a burgess for the municipal borough; but if he does not make any selection, the entry to be so retained shall be selected by the revising barrister, except in the case of freemen, in which case the entry to be retained by the revising barrister for voting shall be that on the freemen's list."

(1) [1895] 1 Q. B. 155.

1898

JONES v. MUNRO.

LORD RUSSELL of KILLOWEN C.J. In my opinion this appeal must fail, and on two grounds. First, that there is no right of appeal at all in such a case; and, secondly, that under the circumstances the appellant was not in a position to give an effective notice of selection.

The facts are as follows: The appellant's name appeared on the list of voters in respect of his qualification for his place of abode. He made a claim to the overseers to have his name inserted in respect of his qualification for his place of business, and his name accordingly appeared on what was called the list of claims, and, although objected to, was allowed by the revising barrister. He delivered at the first revision court a notice in writing to the revising barrister, giving him notice, under s. 28, sub-s. 14, of the Act of 1878, that he desired that his name should be retained on the list of voters in respect of the latter qualification, and that the entry of his qualification in respect of his place of abode should be marked with a note that he was not entitled to vote in respect of that qualification, he being on the list for voting in respect of another qualification. That is to say, he claimed to exercise his election to vote in respect of his business qualification instead of his resident qualification. The revising barrister held that he had no power to do what was asked, and hence this appeal.

At the time that the appellant gave the notice to the revising barrister, his qualification in respect of his business premises appeared only on the list of claims, and his name appeared only on the voters' list in respect of his residence. Now, at that time was he in a position to exercise the right of selection by giving such notice? That depends on the construction of s. 28, sub-s. 14, of the Act of 1878: "Where the name of any person appears to be entered more than once as a parliamentary voter on the *lists of voters* for the same parliamentary borough . . . . the revising barrister shall . . . . retain one of the entries for voting, and place against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification therein contained . . . . he being on the list for voting in respect of another qualification. Any such person may, by notice in writing delivered to the revising barrister at

1898

JONES v. MUNRO.

Lord Russell C.J.

the opening of his first revision court, select the entry to be retained for voting. . . ."

The fatal objection in this case is that at the time the notice evidencing the appellant's desire to elect was given to the revising barrister, his name did not appear more than once "as a parliamentary voter on the lists of voters for the same parliamentary borough." It only appeared once on the list of voters, and once on what was called the list of claims. That, as it seems to me, is fatal to the appellant's case.

But then we have to see whether such a question as this is appealable at all. That depends on s. 42 of the Act of 1843 (6 & 7 Vict. c. 18). It is conceded that at the time that statute was passed no question of this kind could have been within the consideration of the Legislature; but it is very properly said that if the words of the statute are sufficiently wide to include such a case, that of itself is not sufficient to prevent an appeal.

Sect. 42 enacts, "That it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, or who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case," to appeal in the manner therein provided.

It seems to me impossible to bring this case within those words. It is said that this was a claim to have the appellant's name inserted on the list in respect of his business qualification, and that, as he desired to vote for that qualification alone, it was a claim to be inserted effectively in the list. I do not think that it was, and there is nothing either in the language or tenor of the Act which will include such a case.

The effect of our decision will merely be that for the next year the appellant cannot vote in respect of his business qualification, but will have to vote as he has hitherto done in respect of his residence. His name, however, does now appear on the lists more than once, and, by giving due notice to the revising

barrister, he will be able next year to effect the alteration that he desires. Therefore, as it seems to me, there is no real hardship.

With regard to the case of *Reg.* v. *Revising Barrister for Liverpool* (1), I agree that the facts in that case are plainly distinguishable from the facts in this; but I think that it is an authority for saying that the Court must not give unrestrained scope to the language of s. 42, and I am confirmed by it in the view I have taken.

WILLS J. I am of the same opinion. I think that it is impossible to say that the right of selection existed in this case, considering the language of s. 28, sub-s. 14, of the Act of 1878. As to the right of appeal, I am equally clear that there is none. It may be that the case has been overlooked by the Legislature; but the rights of the appellant are purely statutory, and he has no common law rights on which to fall back. It is incumbent on him, therefore, to shew that the statute has given him a right to appeal in this case, and that he has failed to do.

LAWRANCE J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *H. Mear, for Dunn & Baker, Exeter.*

Solicitors for respondent: *Preston, Stow & Co., for Friend, Beal & Tarbet, Exeter.*

(1) [1895] 1 Q. B. 155.

A. P. P. K.

1898
Nov. 10.

LINFORTH, APPELLANT *v.* BUTLER, RESPONDENT.

Parliament—Franchise—Registration—Notice of Objection—Omission to state Place of Abode—Registration Order, 1895, *Sched. I., Form* 5 (*a*).

Notice of objection to the name of the respondent being retained on the ownership portion of the register was sent by the appellant by post to the respondent, and was duly received by him. The appellant omitted to insert in the body of the notice the respondent's place of abode as described in the register, as required by the Registration Order, 1895, Sched. I., Form 5 (*a*), but, with the intention of saving postage, placed it on the back of the notice, where it served as the postal address of the respondent:—

Held, that the notice of objection was good, although it did not strictly follow the form prescribed by the Order.

CASE stated by the revising barrister for the Pudsey Division of the West Riding of the county of York.

At a court held before the revising barrister, the appellant objected to the name of the respondent being retained on the list of voters for the said division of the said county.

The name of the respondent appeared on the ownership portion of the register of electors then in force for the said division as related to the township of Leeds as follows:—

Name, the Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Butler, Rev. Henry Alexander.	17, Virginia Road, Leeds.	Freehold benefice.	As incumbent of Christ Church, Meadow Lane.

The notice of objection to the retention of the name of the respondent was sent through the post to the voter in accordance with s. 100 of the Parliamentary Registration Act, 1843. To prove service of the notice the objector produced the duplicate, which was a printed copy of the form provided by the Registration Order, 1895, Form 5 (*a*). In filling up the form the objector had omitted to insert in the body of the notice the place of abode of the person objected to as described in the register. On the back of the notice, however, the name and

address of the voter were for postal purposes correctly written. The objector stated that he had intentionally omitted to insert in the notice the place of abode of the person objected to as described in the register in order to avoid having to pay the extra halfpenny postage required by some postal regulation.

The revising barrister, who was not asked to amend, decided that the notice of objection was bad, and retained the name of the respondent on the said list. (1)

Lewis Thomas, for the appellant. By s. 18 of the Registration Act, 1885, which prescribed the forms to be followed, "a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." Although that section has been repealed by the Statute Law Revision Act, 1898, because the forms prescribed by the Registration Order, 1895, are substituted for those given by the Act of 1885, the effect is intended to be the same. If the notice substantially does what is requisite, it is not invalidated by a variance from the strict form prescribed. In this case the place of abode of the person objected to was on the same notice with his name,

(1) By the Registration Order, 1895 (March 8, 1895), "it is hereby declared to be necessary for carrying into effect the Local Government Act, 1888, and the County Electors Act, 1888, and the other Acts for the time in force amending or affecting the said Acts, or the Registration of Electors Acts, that the instructions, precepts, notices, and forms under the said Registration of Electors Acts should be altered in manner appearing by the three schedules to this order; and so that the instructions, precepts, notices, and forms set forth in the three schedules to this order should be the instructions, precepts, notices, and forms under the Registration of Electors Acts.

"And it is hereby ordered that the former instructions, precepts, notices, and forms shall be altered accordingly, and that the instructions, precepts, notices, and forms in the schedules to this order shall be observed and be valid in law."

Form No. 5 (*a*) in the first schedule to the order is as follows:—

"*Notice of objection to be given to persons whose names are in the ownership portion of the register when objected to by any person other than overseers, and to the occupying tenant of the qualifying property where notice is required to be given to the occupying tenant.*

"To C. D. ——— of ——— [*here insert the name and place of abode of the person objected to as described in the register, and, in the case of notice to the tenant of the qualifying property, insert his name and place of abode as described in the register*].

"Take notice that I object to your name, &c."

1898

LINFORTH v. BUTLER.

and it can make no difference that the name alone appeared on the face of the notice, and the place of abode on the back of it. The notice was sufficient, since it was properly addressed to the person objected to, and it gave him all the information to which he was entitled.

[He was stopped.]

W. Graham, for the respondent. The notice was insufficient. The registration order directs that the forms given in the schedule "shall be observed," and by the form given in the schedule to the order the place of abode of the person objected to must be given in the notice. The address to which the notice may be sent will often not be the place of abode as described in the register. The appellant had no right to disregard the express directions of the order.

The revising barrister had no power to amend the notice, as the omission was deliberate: *Smith* v. *Chandler*. (1)

LORD RUSSELL of KILLOWEN C.J. In my opinion the revising barrister was wrong. I should like first to consider this case as if s. 18 of the Registration Act, 1885, were still existent and had not been repealed, and then to see whether any alteration has been effected by the repeal of that section and the substitution of the Order in Council for it. The facts of the case are very simple, and are as follows: The name of the Rev. H. A. Butler appeared upon the ownership portion of the register of electors for the Pudsey Division of the West Riding of York. Objection was taken to the retention of his name on the list, and the notice of objection was sent to him through the post. It consisted of a printed form filled up by the objector, and in filling up the form the objector had deliberately abstained from inserting on the face of the form the place of abode of the person objected to, although that place was correctly written on the back of the form, and served as the address of the form when it passed through the post. This omission was, as I have said, made deliberately and with the object, as we are informed, of enabling the notice of objection to pass under a halfpenny stamp instead of bearing a

(1) (1888) 22 Q. B. D. 208.

penny stamp, as the Post Office authorities in their wisdom would have required it to do if the address of the person objected to had been inserted in the body of the notice. The revising barrister held that under the circumstances the notice of objection was bad.

It seems to me material to consider what the object of the notice of objection was, and what object the Legislature had in view in requiring, as they do by the section of the Act and the forms in the schedule, that the address of the person objected to should appear on the notice. The scheme of the Act is that notice of objection should be served upon the person objected to. But it is said that the notice was wrong because the address of the person objected to does not appear on the face of the notice. The object of requiring the address is that the notice shall accurately describe the person objected to, and that the notice shall reach him. If the notice, after giving the name of the Rev. H. A. Butler, had gone on to say, "whose address appears on the other side," it is impossible to contend that that would not be a substantial and an almost literal compliance with the law. But the question we have to decide is whether the notice as it was delivered was in legal form. Sect. 18 of the Act of 1885 provided that "The forms and instruments contained in the second and third schedules to this Act shall be used and observed in all cases to which they apply. . . ."; and the section went on: "but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." That is to say that, if there were a substantial compliance with the forms given in the schedule, a mere disregard of the precise wording or arrangement of such form would be immaterial. If that section were still in force, the contention of the appellant would be unanswerable. He has done all that was substantially necessary to be done; and, therefore, according to that section, his notice of objection is in order. But s. 18 has been repealed by the Statute Law Revision Act, 1898, and the provisions now regulating such notices are contained in the Order in Council of 1895. That order provides, "that the instructions, precepts, notices, and forms in the schedules to this Order shall be observed and be

1898

LINFORTH v. BUTLER.

Lord Russell C.J.

valid in law." Form No. 5 (*a*) is the form of notice of objection to be given in this case. It commences, "To C. D. ——— of ——— [*here insert the name and place of abode of the person objected to as described in the register*]."

Now, are we compelled to say that any departure from that strict form will render the notice invalid? It is worth mentioning that to follow the strict form itself would be tautologous: "To C. D."—presumably the name of the person objected to—"of ——— [*here insert name and place of abode*]." That is to say, this notice ought to run, "To the Rev. H. A. Butler, of the Rev. H. A. Butler, of such and such an address." It is clear that that is not what is intended.

In my view, the notice is not bad merely because it does not follow with absolute strictness the form given in the schedule to the Order in Council. If the notice fails in any substantial respect to give the necessary and proper information to the person on whom it is served, and who is objected to, then it is bad, but only in that case. That is, I think, where the line is to be drawn. Here we have a notice which contains on the same sheet of paper the name and the proper address of the person objected to, and I hold that that notice is sufficient. To take the opposite view would, as it seems to me, be too highly technical.

I will only add that it seems hardly worth while to come for the decision of this Court in such a trivial matter, and that I do not think that the fact that what was done was done intentionally is a bar to any amendment by the revising barrister. A mistake, as it seems to me, is none the less a mistake because it is made deliberately in the pursuance of a mistaken intention; but it seems that the question of amendment is not now before us, as no amendment was asked for from the revising barrister.

WILLS J. I do not think that the law was in any way altered by the repeal of s. 18 of the Act of 1885. A notice which substantially gives all the necessary information is, as it seems to me, as good now as it was before the repeal of that section. The preamble of the Statute Law Revision Act by which the section is repealed is: "Whereas it is expedient that

certain enactments which may be regarded as spent or have ceased to be in force otherwise than by express specific repeal by Parliament, or have by lapse of time or otherwise become unnecessary, should be expressly and specifically repealed." It is clear, therefore, that the Legislature in repealing s. 18 regarded it as unnecessary in view of the provisions of the Order in Council, and thought that the omission of the proviso to that section made no substantial difference.

I agree, therefore, that the appeal must be allowed.

LAWRANCE J. concurred.

Solicitors for appellant: *Ward, Bowie & Co., for Walter & E. H. Foster, Leeds.*

Solicitors for respondent: *Ford & Warren, Leeds.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1898
Nov. 2, 3, 19.

CITY OF LONDON BREWERY COMPANY, LIMITED, *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Mortgage—Trust Deed for securing Debenture Stock—Transfer of Mortgage—Additional or Substituted Security—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-s.* 1; *s.* 87, *sub-s.* 3; *s.* 88, *sub-s.* 1; *Sched. I.*

A limited company issued in 1892 500,000*l.* 4 per cent. debenture stock, secured by a trust deed duly stamped, by which freehold and leasehold property of the company were conveyed to trustees to secure payment of the amount of the stock and interest as provided for by the deed. By a subsequent trust deed for securing debenture stock made in 1897, the trustees of which were the same as those of the deed of 1892, after reciting that the 500,000*l.* debenture stock was still outstanding and that the company were intending to issue further irredeemable 3½ per cent. debenture stock, it was provided that the amount of stock to be issued was limited in the first instance to 300,000*l.*, the company acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at 3½ per cent. per annum; that the company should be at liberty to issue further irredeemable 3½ per cent. debenture stock not exceeding 540,000*l.*, making a total of 840,000*l.*, but only for the purpose of redeeming or paying off the 500,000*l.* 4 per cent. stock at the rate of not more

C. A.

1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

than 108*l.* of the new stock for every 100*l.* of the stock redeemed or paid off; and that before issuing any of the further debenture stock the company should execute and deliver to the trustees an acknowledgment of indebtedness for the amount of the further proposed issue, and the trustees were to certify on the trust deed that the company were entitled to make the issue. The stock was to be issued to such persons and either at par, or at a discount, or at a premium as the company might determine. By the deed the company were, as and when the stock ought to be paid off in accordance with the deed, to pay off the same accordingly; and it was provided that in such case the stock should be paid off at par, except in the case of a voluntary winding-up when the full value of the stock was to be paid, but in any case not less than par. The freehold and leasehold properties of the company were conveyed by the deed to the trustees by way of mortgage as a security for the payment off of the stock as above mentioned. It was further provided that in the event (among other things) of the company making default in payment of the interest on the stock or performance of any of the obligations imposed upon them by the deed, or of the winding up of the company, the security should become enforceable. Upon proof to the satisfaction of the trustees that all the stock had been paid off, the trustees were to reconvey the mortgaged property to the company. The deed also provided for the transfer on payment off of the 4 per cent. debenture stock of the securities for the same to the trustees of the deed of 1897:—

Held, that in respect of the 540,000*l.*, as well as the 300,000*l.*, the deed of 1897 was chargeable with the ad valorem duty specified in the 1st schedule to the Stamp Act, 1891, under the heading "Mortgage, Bond, Debenture, Covenant," and, not being an "additional" or "substituted" security within the meaning of those words in the schedule, it was chargeable with the full duty of 2*s.* 6*d.* per cent.

By A. L. Smith L.J.: The deed of 1897 was a "mortgage" within the definition contained in s. 86, sub-s. 1, of the Stamp Act, 1891.

By Rigby L.J.: *Semble*, the deed was not a "mortgage" within that definition, but it was chargeable as a security for the payment of money in the nature of a debenture under s. 88, sub-s. 1, of the Act.

APPEAL from the judgment of a Divisional Court (Grantham and Channell JJ.) upon a case stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13, with regard to an instrument presented to them for their opinion as to the duty chargeable thereon. (1)

The instrument so presented was a trust deed for securing debenture stock dated May 6, 1897, and made between the City of London Brewery Company of the one part and certain trustees of the other part. It recited that there was then out-

(1) [1898] 1 Q. B. 408.

standing 500,000*l.* debenture stock of the company constituted and secured by a trust deed dated February 20, 1892, and that the company had determined to issue further debenture stock to be called irredeemable 3½ per cent. debenture stock ranking after the former debenture stock, and to be constituted in manner thereinafter provided. By the deed of February 20, 1892, the company conveyed to trustees all their freeholds and leaseholds in trust (in substance) to secure to the holders of the 500,000*l.* debenture stock issued in accordance with that deed the payment of the amount of the stock held by them respectively as provided by the deed, and interest thereon at the rate of 4 per cent. till such payment, and it was provided that the company might give to these stockholders six months' notice expiring at any time after January 1, 1913, to redeem the stock held by them at the price of 108*l.* for every 100*l.* The trustees of the deed of 1897 were the same as those of the deed of 1892. After the above-mentioned recitals, it was by the deed of 1897 witnessed and declared (inter alia) as follows:—

By clause 1, that the expressions following should have the meanings thereinafter mentioned, that is, "stock" meant the amount of the company's indebtedness to the trustees under clauses 2 and 7 thereof; "the stockholders" meant as regards registered stock the several persons for the time being entered in the register thereinafter mentioned as the holders of the stock, or as regards stock represented by certificates to bearer, the bearers for the time being of such certificates. "The 4 per cent. stock" meant such of the existing 500,000*l.* debenture stock as should for the time being be outstanding. By clause 2 the company acknowledged that they were indebted to the trustees in the sum of 300,000*l.* carrying interest at 3½ per cent. per annum payable half-yearly as therein mentioned. By clause 3 the stockholders were to be regarded as the beneficial owners of their respective shares of the stock. By clause 4 the stock might be issued to such persons and on such terms, and either at par, or at a discount, or at a premium as the company should determine. Clause 5 provided that, as and when the stock or any part thereof ought to be paid off in accordance with the provisions of the deed, the company should

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

pay to the stockholders or to those whose stock ought to be paid off the full nominal amount of the stock held by them respectively, with such premiums, if any, as should be payable in respect thereof, and such payment should operate in satisfaction of the amount of the stock, and, in the meantime until the stock was paid off, the company should pay the stockholders interest at the rate of 3½ per cent. Clause 6 provided that the stock should be held subject to the conditions set forth in the 1st schedule to the deed, and that such conditions should be binding on the company and the stockholders and all other persons claiming through them respectively.

Clause 7 limited the amount of stock to be issued, and was in the following terms: "The stock is limited in the first instance to 300,000*l.*, but the company is to be at liberty to issue further irredeemable 3½ per cent. debenture stock, entitled pari passu to the benefit hereof, subject to the following provisions, that is to say:—

"(*a*) Such further irredeemable 3½ per cent. debenture stock shall not exceed 540,000*l.* in amount, making, with 300,000*l.* stock above mentioned, a total of 840,000*l.*

"(*b*) Such further stock shall only be issued for the purpose of redeeming or paying off the 4 per cent. debenture stock of 500,000*l.*

"(*c*) Whenever it is proposed to issue any of the said further irredeemable 3½ per cent. debenture stock, the company must notify in writing to the trustees or trustee the amount of the proposed further issue, and must satisfy the trustees or trustee that by arrangement with the holders of a corresponding amount of 4 per cent. debenture stock, or by reason of notice of redemption having been given, the company is in a position to pay off or redeem a corresponding amount of the 4 per cent. debenture stock, and must provide to the satisfaction of the trustees or trustee for the application of such further debenture stock, or of the proceeds thereof, to such redemption or payment and for the transfer of the 4 per cent. debenture stock to be redeemed or paid off, and the securities for the same, to the trustees or trustee hereof, and for the purposes of this clause the corresponding amount aforesaid is to be calculated on the basis that

not more than 108*l.* of the further irredeemable 3½ per cent. debenture stock is to be issued in respect of every 100*l.* of the 4 per cent. debenture stock redeemed or paid off.

"(*d*) The company must, before any of the said further debenture stock is issued or offered for subscription, execute and deliver to the trustees or trustee an acknowledgment of indebtedness for the amount of the further proposed issue, duly stamped and framed in accordance with clause 2 hereof, and until such acknowledgment is so executed, stamped, and delivered, no part of such further stock is to be entitled to the benefit hereof.

"(*e*) No such further stock shall be issued or offered for subscription unless and until the trustees or trustee shall have certified hereon that the company is entitled to issue the same."

By clauses 8 and 9 the company conveyed and demised by way of mortgage certain freehold and leasehold properties to the trustees, subject nevertheless to the 4 per cent. debenture stock and the securities for the same, and subject to the proviso as to reconveyance thereinafter contained; and by clause 10 they charged in favour of the trustees their other assets both present and future, with the payment of all moneys for the time being owing on the security of the now stating deed.

Clause 12 provided that the security constituted by the deed should, subject to the next succeeding clause thereof, become enforceable in each and every of the events following: (1.) If the company should make default in the payment of any principal moneys or interest which ought to be paid in accordance with the deed, or (2.) if the company should commit any other breach in the performance or observance of any of the obligations imposed upon it by the deed, or (3.) if an order should be made or an effective resolution passed for the winding up of the company, or (4.) if a receiver should be appointed of the undertaking and property of the company or any part thereof, and such appointment should in the opinion of the trustees or trustee be prejudicial to the security constituted by the deed, or (5.) if a distress or execution should be levied against any property of the company. Clause 13 provided

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

for notice being given to the company before enforcing the security, except in certain events therein mentioned.

Clause 15 provided that the trustees should hold the moneys to arise from any sale upon trust to pay expenses, and to apply the residue, first, in or towards payment to the stockholders pari passu in proportion to the amount due to them respectively of all arrears of interest remaining unpaid on the stock held by them respectively; secondly, in or towards payment to the stockholders pari passu in proportion to the stock held by them respectively, and without any preference or priority on account of priority of issue or otherwise howsoever, of all principal moneys due in respect of the stock held by them respectively, and that whether the same principal moneys should or should not then be payable; thirdly, to pay the surplus (if any) of such moneys to the company or their assigns. Clause 46 provided that, upon proof being given to the reasonable satisfaction of the trustees or trustee that all the stock entitled to the benefit of the trusts therein contained and for the time being issued had been paid off or satisfied, and upon payment of all costs, charges, and expenses incurred by the trustees or trustee in relation to the deed, the trustees or trustee should, at the request of the company, reconvey or reassign to the company, subject to the security (if any then subsisting) of the holders of the 4 per cent. debenture stock, or their trustees or trustee, the mortgaged premises, or such part thereof as might remain vested in the trustees or trustee of the deed, freed and discharged from the trusts therein contained, or otherwise release the mortgaged premises from the security.

The conditions contained in the 1st schedule comprised (inter alia) the following: (1.) If and when the stock thereby constituted became liable to be paid off, the company would, subject to the now stating conditions, pay to the several holders of the stock the moneys due to them therefor, calculated at the rate of 100*l.* sterling for every 100*l.* of stock, unless the security should become enforceable by reason of the passing of an effective resolution for voluntary winding-up, in which case the amount should be the full value of the stock calculated as therein mentioned; but in any case not less than par. The

instrument also contained other provisions incidental to a security for the payment of the moneys secured thereunder.

Up to the time when the instrument was presented to the commissioners for their opinion, no acknowledgment of indebtedness referred to in clause 7 (*d*) had been executed and delivered by the company.

The commissioners were of opinion that the sum of 840,000*l.* mentioned in clause 7 was the limit of the total amount secured by or to be ultimately recoverable under the trust deed within the meaning of s. 88, sub-s. 1, of the Stamp Act, 1891. They therefore charged the instrument with the duty chargeable under the head "Mortgage, &c." in the 1st schedule to the Stamp Act, 1891, by reference to s. 86, sub-s. 1, of that Act, and they assessed such duty at 1050*l.*, being 2*s.* 6*d.* for every 100*l.* of the amount secured. The appellants, being dissatisfied with the assessment so far as regards 675*l.*, part of the duty assessed, being the amount attributable to the sum of 540,000*l.*, had required the commissioners to state a case. The questions for the opinion of the Court were whether the instrument was chargeable with the duty of 1050*l.* in accordance with the assessment of the commissioners, and, if not, with what duty it was chargeable. (1)

(1) By 54 & 55 Vict. c. 39 (The Stamp Act, 1891), s. 86, sub-s. 1, "For the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be: and includes . . . . (*c*) any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally or for the benefit of creditors specified who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number. . . . ."

By s. 87, sub-s. 3, "A transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

The Divisional Court held that the instrument in question was a security for the repayment of 840,000*l.* advanced or to be advanced within the meaning of s. 86, sub-s. 1, and s. 88 of the Stamp Act, 1891, but that, in respect of 500,000*l.*, the deed was a substituted security, and was therefore only liable to the reduced ad valorem duty of 6*d.* per cent. under the heading "Mortgage, Bond, Debenture, Covenant" in the first schedule to the Stamp Act, 1891.

The Crown appealed, and the company gave notice by way of cross-appeal.

Sir R. B. Finlay, S.-G., and *Danckwerts*, for the Crown. The deed of 1897 is a creation of a new security at a new rate of interest; it is not a transfer of a security within s. 87, sub-s. 3: nor is it an "additional" or "substituted security" within the meaning of those words in the schedule. The deed of 1897 is the only, or at any rate the principal or primary security, of the holders of the new issue of stock, for without it they would have no security. It is a common practice when a mortgage is paid off out of moneys advanced by a new mortgagee for the latter to stipulate to have, as well as an independent mortgage, a transfer of the old mortgage in order to be secured against intervening incumbrances; but in that case the old mortgage would not be the principal or primary

---

covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security."

By s. 88, sub-s. 1, "A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited."

Under the heading "Mortgage, Bond, Debenture, Covenant," in the first schedule to the Act, an instrument, "being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money," is chargeable with ad valorem duty at the rate of 2*s.* 6*d.* per cent.; while an instrument, "being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped," is chargeable with an ad valorem duty of 6*d.* per cent.

security. It is only by virtue of the deed of 1897 that holders of the new issue are entitled to the benefit of the old deed. An additional security is where further security is given to the same person for the same money. The holders of the 4 per cent. issue get no additional security from the deed of 1897. It is a security for different moneys to be paid to the holders of a fresh issue of stock. It is a mere accident if the holders of the two issues are the same persons. Therefore the deed of 1897 is not an additional security. Neither is it a substituted security. The old issue of 4 per cent. is to be paid off, and a new issue of an irredeemable stock bearing a different rate of interest is to be made, the holders of which may be different persons from the holders of the old stock. A security can only be said to be a substituted security within the meaning of the schedule where it is substituted for a security previously given for the same advance made by the same person.

With regard to the cross-appeal: The deed of 1897 is a mortgage within the definition of a mortgage contained in s. 86, sub-s. 1, of the Stamp Act, 1891. The duty has to be assessed with reference to the character of the instrument when it is executed: see per A. L. Smith L.J. in *West London Syndicate* v. *Inland Revenue Commissioners.* (1) By virtue of the deed of 1897 when executed a conveyance is made of property which is to be redeemable on payment of the amount for which it is a security, and in the event of a further issue of stock beyond the 300,000*l.* it will become a security for the amount of that issue. That is a mortgage. It is clearly, so far as the 300,000*l.* is concerned, a security for the repayment in certain events of definite sums to be advanced by the subscribers to the issue, and therefore is within the definition of "mortgage" in s. 86. If that be so, the provision of s. 88, sub-s. 1, is applicable, and the duty must be charged on the total amount which may be ultimately recoverable—namely, 840,000*l.* The deed clearly comes within the kind of instrument described in clause (*c*) of s. 86, sub-s. 1. The fact that the further issue of debenture stock may never be made makes no difference. The same thing might be said with regard to

(1) [1898] 2 Q. B. 507, at p. 513.

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

the 300,000*l.* in respect of which the duty on a mortgage is admitted to be chargeable. If this instrument comes within the Act, it is immaterial whether or not on the further issue of stock beyond the 300,000*l.* another document would have to be executed which might also be chargeable with duty. The acknowledgment of indebtedness to the trustees provided for in the deed is merely the ordinary acknowledgment clause in a mortgage deed adapted to the circumstances of the case, and does not make the deed a debenture as distinguished from a mortgage within s. 86, sub-s. 1.

[They cited *Canning* v. *Raper* (1); *Mortimore* v. *Inland Revenue Commissioners.* (2)]

Bosanquet, Q.C., and *M. Macnaghten*, for the company. No question is raised by the company as to the 300,000*l.* With regard to the 540,000*l.*, this instrument is not a security that comes within s. 86, sub-s. 1, or s. 88, sub-s. 1, of the Stamp Act, 1891. Sect. 88 is not in itself a taxing section, but merely provides for fixing the amount of the duty on certain mortgage securities chargeable under s. 86, sub-s. 1. It does not extend the scope of that sub-section to securities which are not mortgages within it. This deed is not a "mortgage" within the definition given by s. 86, sub-s. 1. The only words of that definition under which this deed could possibly be brought, as regards the 540,000*l.*, are the words "for the repayment of money to be thereafter lent, advanced, or paid." This is not, however, a security for the repayment of such money. It is to be a security for an issue of debenture stock if and when such an issue is made subsequently. The issue can only be made when the preliminary conditions specified by clause 7 of the deed have been complied with, and may never be made. The expression "money to be advanced," as used in ss. 86 and 88 of the Stamp Act, 1891, means money agreed to be advanced on the security of the particular instrument which is being adjudicated upon: it does not extend the taxing clause so as to make the instrument liable to ad valorem duty in cases where a second instrument is necessary upon the security of which the advance is to be made. Here when the further issue is made the ad

(1) (1852) 1 E. & B. 164. (2) (1864) 2 H. & C. 838.

valorem duty may be payable on that under the heading "Debenture." This deed is, as to the 300,000*l.*, in effect a "debenture": see *Levy* v. *Abercorris Slate and Slab Co.* (1) Before the further issue can be made, another document amounting to a debenture and stamped accordingly—namely, the acknowledgment of indebtedness to the trustees—must be executed under clause 7 (*d*) of the deed. The company ought not to have to pay the duty twice over. If the further issue be made the transaction will not be in the nature of a loan, advance, or payment of money to be repaid. The debenture stock is to be irredeemable, and it is only in certain events that a sum of money is to be paid to the stockholders in satisfaction of the amount of their stock. That amount may not correspond with the sum originally paid by the stockholder. The stock may be issued at a discount, and in the event of a voluntary winding-up the market value of the shares, if above par, will be payable. Sects. 86 and 88 of the Act contemplate mortgage transactions properly so-called in which the repayment of a sum of money advanced or to be advanced is secured by a charge on property—not such a transaction as this. The enumeration of different kinds of instruments in the latter part of s. 86, sub-s. 1, was not intended to extend the definition of "mortgage" so as to include securities which would not be included in the introductory words.

[They cited on this point *British India Steam Navigation Co.* v. *Inland Revenue Commissioners.* (2)]

Assuming that the deed is a security for the repayment of 540,000*l.* to be thereafter advanced, it is either a transfer of a mortgage under s. 87, sub-s. 3, or at most an additional or substituted security under the heading "Mortgage, Bond, Debenture, Covenant" in the 1st schedule of the Act, and in the latter case, it is only chargeable with a duty of 6*d.* in the 100*l.* under that heading. It is not "the only, or principal, or primary security" for the payment of the money. By the terms of the deed the securities for the 4 per cent. debenture issue are to be kept alive and transferred to the trustees of the deed when that issue is paid off. This was necessary to give priority

(1) (1887) 37 Ch. D. 260. (2) (1881) 7 Q. B. D. 165.

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

over any mesne incumbrances on the company's property which might have been created between 1892 and 1897. It is contended that the transaction embodied in this deed is really a transfer of the security of 1892; or that, the deed of 1892 being the principal or primary security, this is merely a security additional to it, or, alternatively, in substitution for it. When the 4 per cent. issue is paid off and the security for that transferred to the trustees for the 3½ per cent. stockholders, that will be their principal or primary security. The deed of 1892 was a first mortgage. The deed of 1897 would be a second mortgage, and, therefore, merely an additional security; or the transaction involved in the deed of 1897 may be regarded as in substance a substitution of that deed for that of 1892 as a security for the sums advanced by the holders of the 4 per cent. issue, accompanied by a reduction of the amount of interest to 3½ per cent.

[They cited on this point *Wale* v. *Inland Revenue Commissioners*. (1)]

Danckwerts, in reply.

Cur. adv. vult.

Nov. 19. A. L. SMITH L.J. read the following judgment:—The two questions which appear to me to arise in this case are, first, whether a deed bearing date May 6, 1897, is "a security by way of mortgage for the repayment of money to be thereafter paid," within the meaning of s. 86, sub-s. 1, of the Stamp Act, 1891 (54 & 55 Vict. c. 39), and is thus liable under the 1st schedule of that Act to a stamp duty of 2*s*. 6*d*. for every 100*l*. of the amount secured; and, secondly, if it be such a security, it falls within any of the provisions of that Act so as to be exempt from such liability.

By a deed dated February 20, 1892, the respondents, the City of London Brewery Company, Limited, conveyed, by way of mortgage to trustees for debenture stockholders in that company, all its freeholds and leaseholds, in trust to secure to such stockholders the amount of not exceeding 500,000*l*., with interest thereon at the rate of 4 per cent., and by this deed it

(1) (1879) 4 Ex. D. 270.

was provided that the company might give to these stockholders six months' notice expiring at any time after January 1, 1913, to redeem the stock held by them at the price of 108*l.* for every 100*l.* In the year 1897 the company was desirous of issuing a further amount of debenture stock which should carry 3½ per cent. interest, and upon May 6, 1897, the indenture which is the subject-matter of this case was executed between the company and trustees on behalf of stockholders. The trustees under this deed are the same persons as under the deed of 1892; but this seems to me to be an accidental circumstance, and not material to this case. By the deed of 1897, after reciting that the 500,000*l.* debenture stock of the company constituted and secured by the trust deed of 1892 was then outstanding, and that the company had determined to issue further debenture stock to be called irredeemable 3½ per cent. debenture stock ranking after the former debenture stock, it was witnessed that the company thereby acknowledged that it was indebted to the then trustees in the sum of 300,000*l.* carrying interest at the rate of 3½ per cent.; that the stockholders were to be regarded as the beneficial holders of their respective shares of this stock; that, as and when the stock or any part thereof ought to be paid off, the company would pay the same to the stockholders at par; that in the first instance the issue of this 3½ per cent. irredeemable stock should be limited to the amount of 300,000*l.*, but that a further issue of the stock, not exceeding 540,000*l.*, making, with the 300,000*l.*, 840,000*l.*, might take place; that such further issue of 540,000*l.* stock should only be used for the purpose of redeeming or paying off the 500,000*l.* 4 per cent. stock; and that this further issue of 540,000*l.* was only to take place when the company was in a position to pay off or redeem a corresponding amount of the 4 per cent. debenture stock. This deed of 1897 also provided for the transfer of the 4 per cent. debenture stock to be redeemed and paid off, and the securities for the same, to the trustees of the deed of 1897, and that, before any of this 540,000*l.* debenture stock was issued by the company, they should acknowledge to the trustees their indebtedness for the amount of the proposed issue in the same manner as by the deed is provided as regards the issue of the

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

A. L. Smith L.J.

300,000*l*. It is also provided by the deed that the security thereby constituted should become enforceable on the happening of five different events, which are particularly set forth in the deed, and by it the freeholds and leaseholds of the company are conveyed to the trustees, and a floating charge is also given by the company in favour of the trustees for the stockholders on the general assets of the company; and it is provided that, when "all the stock entitled to the benefit of the trusts herein contained and for the time being issued has been paid off or satisfied, and upon payment of all costs, charges, and expenses incurred by the trustees or trustee in relation to these presents, the trustees or trustee shall, at the request of the company, reconvey or reassign to the company, subject to the security (if any then subsisting) of the holders of the 4 per cent. debenture stock, or their trustees or trustee, the mortgaged premises, or such part thereof as may remain vested in the trustees or trustee hereof, freed and discharged from the trusts herein contained, or otherwise release the mortgaged premises from this security."

These being the material facts, it is first argued by the company that this deed of 1897 is not a security by way of mortgage for the repayment of money to be thereafter paid. It is a security by way of mortgage; for, although the 840,000*l*. is called irredeemable 3½ per cent. debenture stock, the properties of the company conveyed by the deed to the trustees to secure the same are redeemable upon the happening of the named events. The deed, therefore, contains a clause enabling the company in certain events to redeem, which imports a mortgage. It is clearly not an absolute assignment by the company. Then, is it a security "for the repayment of money to be thereafter paid"? It is a deed to secure the repayment to the holders of the 3½ per cent. stock of moneys paid by them, which repayment by the company is secured to them by means of the machinery of trustees. In my opinion, this deed is what it describes itself as being, namely, a mortgage deed, and comes within the provisions of s. 86 of the Stamp Act, 1891. There is, I think, no need for the Crown to resort to sub-s. (*c*) of s. 86, though I think that sub-section would have availed,

if it had become necessary to rely upon it. I agree with what Mr. Danckwerts for the Crown pointed out, namely, that, if the deed of 1897 is a mortgage within the Act as regards the 300,000*l.*, then s. 88, sub-s. 1, also imposes the duty upon the 540,000*l.*, the difference between the 300,000*l.* and the 840,000*l.*

I now come to the second branch of this case, which is whether upon the facts relating to this mortgage deed of May 6, 1897, it is exempt from the 2*s.* 6*d.* stamp duty per 100*l.* upon the 840,000*l.*, and is liable either to no duty or at the most to a duty of 6*d.* per 100*l.* upon the 840,000*l.*

There are many points made as to this on behalf of the company.

First, it is said that the deed of May 6, 1897, is not "the only, or principal, or primary security for the payment or repayment of money" (see Sched. I. under heading "Mortgage, Bond, Debenture, Covenant" of the Act of 1891), and therefore is not liable to a duty of 2*s.* 6*d.* for every 100*l.* secured thereby.

Now what is the security the stockholders take as regards this issue of the 3½ per cent. stock? It is argued for the company that, inasmuch as by the deed of 1897 the security of the deed of 1892 is kept alive and transferred to the trustees of the 1897 deed, and it is so kept alive and transferred to the trustees to protect the stockholders under the deed of 1897 against any mesne incumbrances which might have been created upon the property of the company between 1892 and 1897, the deed of 1897 is not the "only, or principal, or primary security for the payment or repayment of money." What security would the stockholders of the 3½ per cent. stock have as regards that issue were it not for the deed of 1897? Were it not for this deed, the stockholders of 1897 would have nothing to do with the deed of 1892, which demonstrates that the deed of 1897 is the only, or principal, or primary security for this 3½ per cent. stock; and this point therefore fails the company.

I come to the next point, which is that the deed of 1897 is an "additional security," so far as 500,000*l.* of the 840,000*l.* is concerned, and that, therefore, under clause 2 of Sched. I. of

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

A. L. Smith L.J.

the Act under the heading "Mortgage" this 500,000*l.* is only liable to a duty of 6*d.* for every 100*l.* of this 500,000*l.* It must be remembered that the stockholders of the 4 per cent. stock provided for by the deed of 1892 are under no obligation whatever to take the 3½ per cent. stock provided for by the deed of 1897. They need take none of it. They might, if they pleased, continue as they were under the deed of 1892. The issue of the 3½ per cent. stock and the security given for it by the deed of 1897 was a new matter, though the property of the company with some addition is again pledged as security for this stock, subject to the rights, if any, of the 4 per cent. stockholders thereto. This 3½ per cent. stock might be sold to the public upon the open market: as to this fact my brother Grantham was under a misconception. The only connection, if it can be called a connection, which the 3½ per cent. issue has with the 4 per cent. issue is that the 3½ per cent. stock could not be issued unless and until the company had put itself in a position to pay off a corresponding amount of the 4 per cent. stock. How is this deed of 1897 an additional security to the stockholders of the 4 per cent. stock, or, indeed, to any one else? To the 3½ per cent. stockholders it is their only security. It seems to me that whatever security the 4 per cent. stockholders had under the deed of 1892 remains as it was before, and they take no rights under the deed of 1897, unless they enter into the new adventure and take the new stock by reason of a new bargain, and that no additional security is given to the 4 per cent. stockholders by the deed of 1897. The giving the holders of the 4 per cent. stock the opportunity of obtaining a new stock carrying 3½ per cent. by a new bargain is not giving them an additional security for their 4 per cent. stock, nor is the giving them the possibility of being paid off their 4 per cent. stock earlier than it otherwise might have been, an additional security within the meaning of the Stamp Act, 1891. Nor is the deed of 1897 a substituted security. It is not a security substituted for the security for the 4 per cent. stock. It is a security given for a new stock which an old stockholder may take or not as he likes. If he does so, he has then only the security of the 1897 deed to rely on.

For the reasons above, I am also of opinion that the deed of 1897 is not a "transfer" of the deed of 1892, nor is it a security by way of further charge, and it does not therefore come within the meaning of s. 87, sub-s. 3, of the Stamp Act; and this point of the company is also untenable.

I have now covered all the points raised in argument by the company, and answer the questions put to us thus: that the instrument is chargeable with the duty of 1050*l.* in accordance with the assessment of the commissioners, and I am of opinion that the Crown succeeds, and that this appeal must be allowed.

A. L. Smith L.J.

RIGBY L.J. read the following judgment:—The trust deed of 1897 is a security for a perpetual annual payment to the registered irredeemable debenture stockholders of an annual sum calculated at the rate of 3*l.* 10*s.* for every 100*l.* of the debenture stock held by them respectively. If the annual payments are regularly made, and the company continues to carry on business, a state of things which may continue for an unlimited period of time, no other sum whatever will become due, but the position of stockholders will be analogous to that of holders of Consols who are only entitled to a perpetual annuity redeemable in certain circumstances. The deed, however, provides a machinery by which the stockholders in certain events may become entitled to be paid in satisfaction of their stock either the nominal par value of the stock, or in the case of a winding-up of the company its market value for the time being. By clause 5 of the deed the company covenants, as and when the stock or any part thereof ought to be paid off, to pay the stockholders, or those whose stock ought to be paid off, the full nominal amount of the stock held by them respectively, with such premiums, if any, as shall be payable in respect thereof. The nominal par value may be, and probably will be, a different thing from the price at which the stock is issued, and the market value at the time of winding up may be altogether different both from the nominal par value and the issue price. In calculating the sum to be paid in satisfaction of the stock, the issue price, which is the only sum passing from a subscriber

C. A.
1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

Rigby L.J.

to the company, is not treated as a factor. I do not see how it is possible to treat this as in any sense a transaction of borrowing and lending. It is one of sale and purchase of an annual sum with a superadded right on the part of the purchaser to have, in certain defined events, a lump sum, to be ascertained according to the events, paid to him in lieu of further annual payments. If the subject-matter had been property of any other description than stock having a nominal value in the books of the company, it never could have been doubted that this was the nature of the bargain, and the fixing of a nominal value to the property dealt with seems to me in no way to affect the substance of the transaction. If for the support of the claim of the commissioners it had been necessary to bring the deed within the special definition of "mortgage" contained in the Stamp Act, 1891, I should have felt great difficulty. Turning to the definition in s. 86 of the Act, and dealing first with the introductory words explaining the meaning of the word "mortgage" for the purposes of the Act, it may, I think, be assumed that the security is a security by way of mortgage; but it clearly is not for the payment of a definite and certain sum, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable. I think it equally clear that it is not a security for the repayment of money to become due on an account current. It is indeed money to become due, but it is to become due by virtue of the express covenant to that effect contained in the trust deed, coupled with the payment of the issue price. The only remaining words of the introductory part of the section are, "the repayment of money to be thereafter lent, advanced, or paid," and, if the case cannot be brought within these words, I do not see how the security can be a mortgage within the meaning of the Act. Now the price paid for the stock cannot in any usual or ordinary sense of the term be said to be "advanced" any more than the price paid to a tradesman for goods bought in his shop can be said to be advanced to him. It is of course paid, but it is paid out and out, without thought on either side of repayment, though something more or less approximating to it in average circumstances is to become due from the company. I have therefore great difficulty in bringing

the case within the introductory words of the section defining the term "mortgage."

It was argued on the part of the Crown that the deed falls within the description of sub-s. (*c*) of s. 86, and I am of opinion that it does, but it seems to me that this will not suffice to make the deed a "mortgage" within the Act. Sub-ss. (*a*) to (*g*) are not to be taken as though they were parallel clauses extending the introductory words defining the meaning of "mortgage" and adding cases not included within them. They only add by way of greater precaution and to avoid misapprehension an extensive, though possibly not exhaustive, list of the various sorts of instruments which, if they answer the requirements of the introductory words, will be "mortgages" within the meaning of the Act. To treat them as operating independently of the introductory words would be altogether to deprive of effect in most, if not all, cases the very words which are inserted to give the meaning of "mortgage." If it were necessary to decide the point, I should be strongly inclined to be of opinion that the trust deed of 1897 is not a mortgage within the meaning of the Act.

It is however a security containing (clause 5) a covenant by the company to pay in the events specified the lump sum payable to the respective stockholders, and I consider that the name "debenture" is properly attributable to it: see *Levy* v. *Abercorris Slate and Slab Co.* (1), and cases therein referred to. The stamp duty payable upon it as a debenture is 2*s.* 6*d.* in the 100*l.* on the amount on which it is to be charged with duty, and this has to be determined by s. 88 of the Act. The security is a security for the payment by the company under clause 5 of money to be paid by them, and the total amount secured or to be ultimately recoverable extends and is in every case, except that of the company being wound up when the market value of the stock is above par, limited to the sum of 840,000*l.* It is therefore available as a security for the whole of that sum, and it is with duty on that sum that the deed is to be charged at the rate of 2*s.* 6*d.* per 100*l.*

(1) 37 Ch. D. 260.

C. A. 1898

CITY OF LONDON BREWERY COMPANY v. INLAND REVENUE COMMISSIONERS.

Rigby L.J.

The duty so reckoned is 1050*l.*, the sum assessed by the commissioners.

I agree with all that A. L. Smith L.J. has said as to the question of this being a collateral, or auxiliary, or additional or substitutional security within the meaning of the schedule. The only security taken by the stockholders is under the trust deed of 1897, although by that deed provision is made for keeping alive the security in favour of paid-off 4 per cent. stockholders under the deed of 1892. This last-mentioned security would have disappeared altogether but for the provisions of the deed of 1897, and, to the extent to which it operates when kept alive, is as much part of the security of 1897 as any part of the security created for the first time by that deed.

COLLINS L.J. I do not think that it is necessary to decide in which of the categories mentioned by ss. 86 and 88 this deed is included, because, whether or not it comes within the preliminary definition of a mortgage given by s. 86, I am of opinion that it is certainly within one or other of the provisions of the sections. I agree with the reasoning put forward by my brother A. L. Smith and adopted by my brother Rigby as the ground of the conclusion that this deed was liable to a stamp duty of 2*s.* 6*d.* and not 6*d.* on the 100*l.* in respect of the 540,000*l.*

Appeal allowed and cross-appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for company: *Western & Sons.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1898
Nov. 26.

SMITH *v.* LANCASHIRE AND YORKSHIRE RAILWAY.

Employer and Workman—Accident to Workman "arising out of and in the course of the Employment"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A ticket-collector got upon the footboard of a train, after it had started, not for any object of his employment, but for his own pleasure. In getting off he was injured:—

Held, that the accident was not one "arising out of" his employment within s. 1 of the Workmen's Compensation Act, 1897, and that compensation was not recoverable under the Act.

APPEAL from the decision of the county court judge of Lancashire holden at Colne, on a question of law arising on a claim for compensation under the Workmen's Compensation Act, 1897.

The appellants were the Lancashire and Yorkshire Railway Company, and the respondent was the legal personal representative of a platelayer in the employment of the company. The county court judge found as a fact that the deceased, on the day on which the accident happened, was in the employment of the appellants, that he was collecting tickets at a station of the company, and that his day's duty was not finished at the time of the accident. A train came into the station, and after he had finished collecting the tickets he stood on the platform. After the train started he got on the footboard and made a remark to a lady passenger. It was found that getting on the footboard was not obviously dangerous, and did not amount to serious and wilful misconduct, but that in getting off the footboard he caught his foot and fell, and was crushed between the platform and the train and killed. It was further found that the deceased was not actually engaged in any act of service at the time of the accident, and did not get on the footboard for any object of his employers, but for his own pleasure. The learned judge held that the accident arose in the course of the employment of the deceased, because it happened during the

C. A. 1898

SMITH v. LANCASHIRE AND YORKSHIRE RAILWAY.

time he was being paid for attendance at the station, and while he was not neglecting in any way his duty for purposes of his own; and also that it arose out of his employment, because it was an accident happening to him from the train about which his duties were concerned, and that, though the danger was increased by the mode in which he was behaving, this, in the absence of serious and wilful misconduct, did not prevent its arising out of the employment. An order for compensation to be paid by the appellants was accordingly made.

The railway company appealed.

C. A. Russell, Q.C., and *Acton*, for the appellants. The accident did not arise "out of" the employment of the deceased. Nor did it arise "in the course" of the employment, for those words do not imply liability during the whole time the workman is on duty, but mean that at the time of the accident he was doing something which he was employed to do. The deceased was not doing anything in furtherance of his employers' interest, but something altogether outside his employment.

A. T. Lawrence, Q.C., and *F. H. Mellor*, for the respondent. The words "arising out of and in the course of the employment" are equivalent to "while he is employed." The Act does not affect the liability of the employer for any default on his part or his common law liability, but makes him in effect an insurer, so that if a workman is injured while he is being employed compensation is payable. The workman need not be at the time of the accident in the actual discharge of some part of his duty; it is sufficient if he is at the place where the accident takes place for the purpose of discharging his duty. If that is the case, the accident may properly be said to have arisen out of and in the course of the employment. The words as to appeal in Sched. II. (4.) do not definitely exclude an appeal as to facts, and it is submitted that the finding of the learned judge that the deceased was on the footboard for his own pleasure was not according to the evidence.

A. L. SMITH L.J. I am of opinion that this appeal should be allowed. This is the third case that has come before us

under the Act, and I wish to take the opportunity of saying that under provision 4 of Sched. II. to the Act it is only questions of law which we have to determine on appeal. In cases under this Act, as in appeals generally from county courts, questions of fact are not the subject of appeal. The county court judge has found the facts, and has relegated them to us, and we have to decide any question of law arising on them.

This appeal is on the ground that on the facts found this case is not brought within the Employers' Liability Act, 1897. What are those facts? The deceased got upon the footboard of the train, and the judge finds as a fact "that the deceased was not actually engaged in any act of service at the time of the accident, and did not get on the footboard for any object of his employers, but for his own pleasure." I wish to point out that the Act of 1897, which makes the employer in effect an insurer, only does so in certain cases; and we must turn to the Act to see what those cases are. Sect. 1 is: "If in any employment to which this Act applies personal injury by accident arising out of or in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." That takes us to s. 7, to see what is the employment to which the Act applies, and this section limits the application of the Act to "employment by the undertakers as hereinafter defined, on or in or about" a railway, factory, and other things mentioned. This man, being on a railway, was in an employment to which the Act applies; but that alone is not enough, for the personal injury, by s. 1, must be one "arising out of and in the course of his employment." It is necessary to shew an employment to which the Act applies, and also that the accident which caused the injury was one arising out of and in the course of such employment. Both must be established. I do not propose to go into the question whether this accident was one arising in the course of the employment of this man; for it is to my mind impossible to say that, on the finding of fact of the learned judge, the accident arose out of the employment. One of the essentials to recovery is therefore wanting, and I think that the decision of the

C. A. 1898

SMITH v. LANCASHIRE AND YORKSHIRE RAILWAY.

learned county court judge must be reversed, and the appeal allowed.

RIGBY L.J. I am of the same opinion. It is clear that on this appeal we have nothing to do with the correctness or otherwise of the findings of fact. The finding of fact which is of importance in this case is conclusive that the accident to this man was not one that happened by reason of or arising out of his employment. It is stated that he got on the footboard, not for any object of his employers, but for his own pleasure. This might have been a natural and innocent deviation from his duty, but nevertheless the finding negatives a condition on which the liability of the employers rests.

COLLINS L.J. I am of the same opinion. At the time of the accident, according to the finding of the learned judge, all that the deceased had to do for the company arising out of his employment was done and completely discharged. The finding is that the deceased was not actually engaged in any act of service at the time of the accident, and did not get on the footboard for any object of his employers, but for his own pleasure. This seems to me to be a conclusive finding that the accident did not arise out of the employment, and the inclination of my mind is to say that it did not arise in the course of that employment. Whether my view on the latter point is correct or not, both conditions are necessary in order that the employer may be liable. I do not think it necessary, in the case before us, to decide anything on the conditions which arise in cases to which the maxim respondeat superior applies, and any points that may so arise must be left open.

Appeal allowed.

Solicitors for appellants: *Woodcock, Ryland & Parker, for Moorhouse, Manchester.*

Solicitors for respondent: *Ridsdale & Son, for F. J. Bendall, Nelson, Lancashire.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1898
Oct. 27.

COUGHLIN *v.* GILLISON AND ANOTHER.

Bailment—Gratuitous Loan of Chattel—Defect in Article Lent—Knowledge of Lender—Injury to Borrower resulting from Defect—Liability of Lender.

The duty of a gratuitous lender of a chattel, for use by the borrower, is to communicate defects in the article lent, with reference to the use to which it is to be put, of which he is aware, and if, wilfully or by gross negligence, he does not discharge this duty, he is liable for injury resulting to the borrower from such defects.

Blakeman v. *Bristol and Exeter Railway*, (1858) 8 E. & B. 1035, and *MacCarthy* v. *Young*, (1861) 6 H. & N. 329, approved.

APPLICATION to enter judgment for the plaintiff or for a new trial.

The action was brought to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendants. The defendants were owners of a sailing ship which was lying in the South-West India Dock and was about to leave in ballast. The defendants contracted with a firm of ballast contractors to ballast the ship; and this firm employed a number of men, including the plaintiff, to do the work, and supplied them with hand-winches for that purpose. There was on the foredeck of the ship a donkey-engine which had been used to move the ship in the dock. On the day after this user the men employed to ballast the ship applied to the captain for leave to use the donkey-engine for that purpose. The captain consented to their doing so provided they employed and paid a competent engineman; and they accordingly employed the man who had worked the engine on the day before. While the work of ballasting was going on, the boiler of the engine exploded and the plaintiff was injured.

The case was tried before Hawkins J. with a jury, and the learned judge directed judgment to be entered for the defendants.

The plaintiff appealed.

C. A. 1898

COUGHLIN v. GILLISON.

Cyril Dodd, Q.C., and *Minton Senhouse*, for the plaintiff. First, the bailment of the engine was not gratuitous, for the owners were interested in expediting the ballasting. Further, the defendants might have found out the condition of the boiler, and they ought to have done so. There was, therefore, gross negligence on their part, and, even if there was a gratuitous loan, they are liable for not disclosing the defect in the engine. It is not necessary to shew concealment or actual knowledge: *Moffatt* v. *Bateman*. (1) If there was gross negligence as in this case, or anything in the nature of a trap, that will make the lender liable.

The obligations on a gratuitous lender are stated by Pothier, Traité du prêt à usage, para. 84, thus: "En général, le prêteur doit donner avis à l'emprunteur, de tout ce qu'il a intérêt de savoir par rapport à la chose qu'il lui prête; et si, par dol ou par une faute lourde, il manque de lui en donner connaissance, il est tenu envers lui, actione contrariâ commodati, de ses dommages et intérêts."

Dalloz Jurisprudence générale, supplément, vol. 13, p. 614, in art. 24, under the heading "Prêt," makes it plain from the instance given that the liability of the lender arises not only when he knows of the defect and keeps back the knowledge of it from the borrower, but when there is in fact a latent defect which he ought to have known and disclosed to the borrower.

[They cited *Blakemore* v. *Bristol and Exeter Railway* (2), *MacCarthy* v. *Young* (3), and *White* v. *France*. (4)]

Pickford, Q.C., and *Maurice Hill*, for the defendants, were not called on.

A. L. SMITH L.J. This is an action by a man who was injured by the explosion of the boiler of a donkey-engine on board a ship, and the defendants are the owners of the ship. The plaintiff was engaged with other men by a firm of ballast contractors to ballast the ship, and in an ordinary way they

(1) (1869) L. R. 3 P. C. 115.
(2) 8 E. & B. 1035; sub nom. *Blackmore* v. *Bristol and Exeter Railway*, 27 L. J. (Q.B.) 167.
(3) (1861) 6 H. & N. 329; 30 L. J. (Ex.) 227.
(4) (1877) 2 C. P. D. 308.

would do this by winches worked by hand. They appear to have wished to work by steam rather than by hand, and they went to the captain and asked to be allowed to use the donkey-engine. They were told they might use it if they got a competent man to work the engine so as not to injure it, and paid him for doing so. The engine was handed over for them to use on these terms, and while it was being used the boiler exploded and the plaintiff was injured. This action was tried before Hawkins J. with a jury, and the learned judge held that there was no evidence to go to the jury, and directed that judgment should be entered for the defendants.

The first point raised on this appeal is that this was not a gratuitous bailment; but it is impossible to see any evidence in support of this suggestion which could have been left to the jury.

The other point in the case is a point of law, as to what is the duty of a bailor towards a bailee when the bailment is gratuitous. The law on this subject has been laid down by the Court of Queen's Bench in *Blakemore* v. *Bristol and Exeter Railway* (1) and to this effect: "As the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured."

Knowledge of the defect is an essential to the right of the borrower to recover, where he has been injured by reason of the article not being fit for the purpose for which it was lent. It is said that is not the law, but that an action is maintainable if the bailee can shew gross negligence on the part of the bailor in not finding out the defects. I will go this far—that if gross negligence is shewn on the part of the bailor in not communicating to the bailee that which he knew of the insufficiency of the article bailed an action is maintainable; but the law does not go further than that.

The decision in *Blakemore* v. *Bristol and Exeter Railway* (2) was followed in *MacCarthy* v. *Young*. (3) In my opinion the

(1) 8 E. & B. at p. 1051.
(2) 8 E. & B. 1035.
(3) 6 H. & N. 329; 30 L. J. (Ex.) 227.

C. A. 1898

COUGHLIN v. GILLISON.

A. L. Smith L.J.

decision of the Privy Council in *Moffatt* v. *Bateman* (1) does not apply, for that was not the case of the bailment of a chattel. What was there laid down was that if you undertake to drive a man in your carriage, you must not be guilty of gross negligence in driving if you wish to escape liability for an accident to him while being driven. But where in the case before us is there evidence of gross negligence, or indeed of any negligence at all? The issue is on the bailee to give affirmative evidence of negligence on the part of the bailor in not disclosing the defect. Where in this case was there evidence that the defendants knew that the boiler was not sufficient for the purpose for which it was lent? The engine had been worked on the day before the accident by the shipowners for their own purposes, and the case is absolutely bare of evidence of any knowledge of the defect or of any negligence on the part of the captain, who stipulated that a competent man should be employed to take charge of the engine so as not to injure it.

For these reasons I think the learned judge was right in entering judgment for the defendants, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I also think that in cases of gratuitous bailment, in order to make the bailor liable for injury happening to the bailee from a defect in the article lent while he is using it, it must be shewn that there was some concealment by the bailor of a material fact known to him, or some such negligence in not disclosing the facts relating to the article lent as would amount to the same thing. If the article lent had been put on one side and not used for years, and then lent without any intimation to the bailee of this fact, the case might approximate to one of actual concealment. Here the engine had been used for the purpose of moving the ship the day before the accident. Under these circumstances I cannot see that there was an obligation on the defendants to examine the engine, the neglect of which would make them as responsible as if they had known—which they certainly did not—that the engine was insufficient.

(1) L. R. 3 P. C. 115.

COLLINS L.J. I am of the same opinion. In my view this is purely a case of lender and borrower, and I desire to limit my judgment to cases of that class.

Usually in the case of a gratuitous bailment questions arise as to the standard of duty on the part of the bailee. It is quite possible that a gratuitous bailment might be with some benefit to the bailor, and in such a case there may be a much greater liability on the bailor than where the bailment is for the benefit of the bailee only. Here the engine was not in any sense used upon the invitation of the defendants or in their interest. What, then, is the duty of a lender in such a case? The principle is laid down very clearly in *Blakemore* v. *Bristol and Exeter Railway* (1) and *MacCarthy* v. *Young*. (2) It is his duty to communicate to the borrower defects in the article lent of which he is aware, and if either deliberately or by gross negligence he does not discharge this duty, he is liable for injury resulting to the borrower. That, in my opinion, is the limit of his liability. A passage in Pothier was referred to in the course of the argument in paragraph 84 of the Traité du prêt à usage, in which it is said that in general the lender ought to give notice to the borrower of all that he has an interest in knowing in regard to the thing lent. I thought at the time that this passage referred to communicating matters of which the lender was aware. Referring back to the earlier part of the same paragraph and to paragraph 80, that must be so. In the last-mentioned paragraph the case is put of a loan of a thing to which another has a title, and which can be demanded from the borrower; but it is clear that the instance given is that of either deliberately or by gross negligence not giving notice of that which was known to the lender. A passage from a work by another French lawyer was cited; but all I have to say about it is that the conclusion sought to be derived from it is not consonant with English law.

The case of *Moffatt* v. *Bateman* (3) has no bearing on the present case. That case belongs to the class of bailments of which the case of carriers is an example. The plaintiff had

(1) 8 E. & B. 1035. (2) 6 H. & N. 329; 30 L. J. (Ex.) 227.
(3) L. R. 3 P. C. 115.

C. A. 1898

COUGHLIN v. GILLISON.

intrusted himself to the defendant to be carried, and there was a clear duty on the part of the bailee towards the bailor not to be guilty of gross negligence causing injury to him. That case can have no application to the present one, where the defendants were not bailees but lenders.

Appeal dismissed.

Solicitors for plaintiff: *Lovett & Liddle.*

Solicitors for defendants: *Thomas Cooper & Co., for Hill, Dickenson, Dickenson & Hill, Liverpool.*

A. M.

1898 *Nov.* 5.

[CROWN CASE RESERVED.]

THE QUEEN *v.* GARDNER.

Criminal Law—Evidence—Right of Counsel for Prosecution to sum up where Prisoner gives Evidence—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *ss.* 2, 3.

Where, upon the trial of an indictable offence, the person charged gives evidence in his own behalf, but does not call witnesses, the counsel for the prosecution is entitled, immediately after the person charged has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged.

CASE stated by the chairman of quarter sessions for the county of Oxford.

The prisoner Gardner and one Beale were tried upon an indictment for breaking into a warehouse and stealing goods therefrom. Both prisoners were defended by counsel. At the close of the case for the prosecution the counsel for each prisoner announced that the prisoners applied to be called as witnesses, and that no other evidence would be called for the defence.

The counsel for Gardner submitted—(1.) That inasmuch as the prisoners were required by the Criminal Evidence Act (61 & 62 Vict. c. 36), s. 2, to be called "immediately after the close of the evidence for the prosecution," the counsel for the prosecution could not sum up the evidence at that stage of the proceedings, as he would have been entitled to do under 28 & 29 Vict. c. 18, s. 2; and (2.) that if his right to sum up

the evidence was not altogether taken away by the first-mentioned Act, he was at any rate not entitled to comment on the evidence offered by the prisoners.

The learned chairman ruled—

(1.) That inasmuch as it was enacted by s. 3 that the calling of the prisoners as witnesses should not confer upon the prosecution the right of reply, and as s. 2 merely required the immediate calling of the prisoners at the close of the evidence for the prosecution, that Act did not by implication take away from the counsel for the prosecution the right to sum up the evidence conferred by 28 & 29 Vict. c. 18, s. 2, but that he was entitled to sum up at the close of the prisoner's evidence.

(2.) That the counsel for the prosecution was entitled in summing up the evidence against the prisoners to deal with the evidence which they had given as well as with the evidence which the prosecution had adduced.

The counsel for the prosecution summed up after the prisoners had given their evidence, and dealt with all the evidence before the Court. The counsel for the defence replied. The prisoner Beale was acquitted, but Gardner was convicted and sentenced to eighteen months' imprisonment with hard labour.

The questions for the Court were—

(1.) Has the Criminal Evidence Act, 1898, taken away the right of the prosecuting counsel to sum up cases where a prisoner applies to give evidence, but does not call witnesses?

(2.) If the prosecuting counsel is entitled to sum up at the close of the prisoner's evidence, is he entitled to comment on that evidence, or is he to be required to confine his summing-up to the evidence adduced by the prosecution? (1)

(1) By 61 & 62 Vict. c. 36 (The Criminal Evidence Act, 1898), s. 1, every person charged with an offence is made a competent witness for the defence at every stage of the proceedings.

By s. 2, "Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution."

By s. 3, "In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."

1898

REG. v. GARDNER.

Turrell, for the prisoner. The ruling of the chairman of quarter sessions was wrong on both points. The rights of counsel for the prosecution are not enlarged by the recent Act. Apart from the provisions of s. 2 of Denman's Act (28 & 29 Vict. c. 18), counsel for the prosecution had no right to sum up his evidence at all in cases where the prisoner called no witnesses. The provisions of s. 2 of the Act of 1898 impliedly take away the right of the defendant or his counsel to open his case where the person charged is the only witness called in his behalf, for it enacts in plain terms that the person charged must be called immediately after the close of the evidence for the prosecution: these provisions equally take away by implication the right of the counsel for the prosecution to sum up his evidence; the right to sum up is not merely postponed until after the prisoner has given his evidence: it is altogether extinguished.

Secondly, assuming that the Act operated merely to postpone the time at which the counsel for the prosecution can exercise his right of summing-up, that right must be strictly confined to summing up the evidence called on behalf of the Crown, and cannot include a right to criticise or comment upon the evidence given by the prisoner. Such a right of comment would be an extension of the right of reply as it existed before the passing of the Act of 1898, s. 3 of which provides expressly that the fact that the person charged has been called as a witness is not of itself to confer on the prosecution a right of reply.

[LORD RUSSELL of KILLOWEN C.J. Is not a prisoner's statement before the magistrate invariably put in at his trial, and is it not frequently commented upon by the counsel for the Crown?]

Yes; but there the statement is put in as part of the case for the prosecution, while a prisoner who gives evidence under the new Act is not a witness for the prosecution at all, and cannot be replied upon. [He referred to *Reg.* v. *Holchester*. (1)]

Biron, for the prosecution, was not called upon to argue.

(1) (1865) 10 Cox, 226.

1898

REG. v. GARDNER.

LORD RUSSELL of KILLOWEN C.J. I am of opinion that the court of quarter sessions took a right view of and acted in a right manner in regard to each of the points raised in this case. The material facts may be stated in a short compass. Two men, Gardner and Beale, were charged with breaking into a warehouse and stealing goods therein; they were both defended by counsel, and at the close of the evidence for the prosecution counsel for each prisoner claimed the right of his client to be called as a witness, adding that it was not proposed to call further evidence for the defence. The first question that arises is, When is that evidence to be given? Is it to be given before or after the counsel for the prosecution has summed up his case, as undoubtedly under Denman's Act he had a right to do? The answer to this question depends upon the Criminal Evidence Act, 1898. That Act (reading it shortly) provides in s. 1 that every person charged with an offence is to be a competent witness for the defence at every stage of the proceedings; and the effect of the provisoes is that the prisoner is a competent, but not a compellable, witness, and that he cannot be called as a witness except upon his own application. Then s. 2 provides that where the person charged is the only witness called for the defence, he is to be called *immediately* after the close of the evidence for the prosecution; and s. 3 provides that where the right of reply depends upon whether evidence has been called for the defence, the calling of the person charged as a witness is not of itself to give the right of reply. These are the only material sections in this connection.

Now, in the present case, after the evidence for the prosecution had closed, an application was made on behalf of the prisoner that he should be called as a witness, and an intimation given that no other evidence would be called. What was the proper course for the chairman to pursue? In my opinion the question admits of a clear answer. The section says that in such a case the person charged is to be called as a witness *immediately* after the close, not of the case for the prosecution (which expression might include the summing-up of counsel), but of the *evidence* for the prosecution; it is clear, therefore,

1898

REG. v. GARDNER.

Lord Russell C.J.

that the magistrates were right in holding that the counsel for the prosecution was not to sum up at that moment, but that the prisoner's evidence must then be given. What was the effect of that upon the right of the prosecuting counsel to sum up? Did it operate as an extinguishment of the right altogether, or merely as a postponement of the time at which the right was to be exercised? I think that if an extinguishment of the right had been intended, the statute would have said so in so many words; and it is evident to me that the statute operates as a postponement only to a later stage of the proceedings of the right of the prosecuting counsel to sum up. I think that that is the answer which we must give to the first question asked us—that the magistrates were right in holding that the prisoner must be called at once as a witness, and that the right to sum up was not extinguished, but merely postponed.

Then comes the second question raised in the case, which is whether counsel for the prosecution, who is thus called upon to sum up, is entitled, if he thinks fit, to make references to, and comments upon, not merely the evidence called for the prosecution, but also the statement of the prisoner himself. It has been contended before us that he cannot make any comment in summing up except upon the evidence adduced on behalf of the prosecution, and the learned counsel based his argument upon the construction which he seeks to place upon s. 2 of Denman's Act, which enacts that, where a prisoner defended by counsel does not call evidence, counsel for the prosecution is to be allowed to address the jury a second time in support of his case for the purpose of summing up the evidence against the prisoner. When that statute was passed, prisoners were not competent witnesses in their own behalf; but the effect of the recent Act is that a prisoner can give evidence in his defence before the time at which the prosecuting counsel can exercise his right of summing-up. Is it good sense to say that the counsel must shut his eyes to the fact that the prisoner has given evidence which is, or may be, wholly inconsistent with the case for the prosecution? I may suggest as an illustration a defence of an alibi, in which the prisoner when called

says that at the time of the offence charged against him he was many miles away working in a factory with several companions: is it good sense to say that in such a case, where the prisoner has given evidence on oath, the counsel for the prosecution is to be obliged in addressing the jury to refrain from making the simple comment that not a single witness has been called by the prisoner to corroborate his statements? It seems to me that it would be an idle suggestion; there would be no reason or good sense in such a course. If, too, we recollect the state of things that existed before the statute which enabled parties to give evidence, no reason will be found for departing from a reasonable course of practice. Under the provisions of Jervis's Act a prisoner charged with an indictable offence is cautioned, and any statement made by him after such caution is taken down, and it is the invariable course at his subsequent trial, whether such statement tells for him or against him, to put it in as part of the case for the prosecution, treating it not as evidence, but as a statement made by the prisoner; and it is further a most ordinary thing for counsel to point out inconsistencies apparent in the statement. I have come, therefore, to the conclusion, without any doubt, that the magistrates were right in their rulings as to the postponement of the right of summing-up, as to the time at which the prisoner's evidence was to be given and the right of summing-up exercised, and as to the right of counsel to refer in his summing-up to the evidence given by the prisoner. The conviction must, therefore, be affirmed.

HAWKINS J. I am of the same opinion, and my Lord has so entirely expressed my own views that I will add but very few words. If we construe strictly the provisions of Denman's Act, applying it to the present state of circumstances when prisoners are competent witnesses in their own behalf, I think that on the strictest construction of the language used the counsel for the prosecution would have the right to comment on the evidence given by the prisoner. In s. 2 of that Act the counsel for the prosecution is given the right of addressing the jury a second time "in support of his case, for the purpose of

1898

REG. v. GARDNER.

Hawkins J.

summing up the evidence against such prisoner." Where a prisoner gives evidence on his own behalf, his object is to lessen the force of the evidence for the prosecution; and the object of the summing-up is to take the evidence of the prisoner and comment upon it, and shew that the effect of the evidence given on behalf of the prosecution ought not to be disturbed.

WILLS J. I am entirely of the same opinion. In my opinion the answer to the second question is really settled by the answer to the first. Unless the right of addressing the jury a second time has been altogether taken away from the counsel for the prosecution, his address must be founded upon all the materials then before the Court. By postponing the time at which it is to take place, an extension is given to the range of the summing-up; and if there be anything in Denman's Act which is inconsistent with this view, I should have no hesitation in saying that to that extent that Act had been impliedly repealed. I cannot suppose that the Legislature intended anything so absurd and so mischievous as that the counsel for the prosecution should be compelled to confine his observations to a portion only of the case.

WRIGHT J. and BRUCE J. concurred.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitor for prisoner: *George Mallam, Oxford.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1898
Nov. 26.

POWELL *v.* BROWN AND ANOTHER.

Employer and Workman—Accident to Workman—Employment "about" a Factory—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A cart, belonging to the owners of a factory, was standing in a street, close to the entrance to the factory yard, in a position in which it was usually loaded. A workman in the employment of the factory owners was engaged in loading the cart, and was injured while doing so. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge, before whom the claim came, held that the employment was "about" a factory within the meaning of s. 7, sub-s. 1, and awarded compensation. On appeal:—

Held, that the section includes the case of employment in proximity to a factory, and that consequently it was a question for the arbitrator to determine whether, as a matter of fact, the employment was in proximity to the employers' factory.

APPEAL from the decision of the county court judge of Liverpool on a question of law arising under the Workmen's Compensation Act, 1897, on a claim for compensation.

The appellants were Messrs. Brown & Backhouse, builders and contractors, and the respondent was the legal personal representative of William Powell, deceased, who had been a workman in the employment of the firm.

The appellants occupied premises which the county court judge held to be a factory within the meaning of the Act. A cart belonging to them was standing in the street, near to the entrance of their premises, upon which timber taken from the premises had been placed. It was Powell's duty to arrange this timber on the cart. He was occupied in so doing when he fell down and on to the street, and received injuries from which he died. The judge came to the conclusion on the evidence that Powell had stepped on one of the pieces of timber which he had arranged in the cart, and that it had canted up so that he overbalanced himself and fell, and that the accident was not attributable to any serious and wilful misconduct on his part.

C. A. 1898

POWELL v. BROWN.

He found that the accident arose out of and in the course of Powell's employment. He ruled that the position of the cart in the street outside the factory brought the case within s. 7, sub-s. 1, as the employment though not "on" or "in" the factory was "about" it, and determined that the applicant was entitled to compensation, and awarded accordingly.

Messrs. Brown & Backhouse, the employers, appealed.

Joseph Walton, *Q.C.*, and *A. Aspinall Tobin*, for the appellants. In ordinary language the word "about" may mean "relating to," or it may have a local sense. In s. 7, sub-s. 1, it cannot have the meaning of "relating to," for that would include incidental or ancillary, and would bring in the cases of contract excluded by s. 4. So if the undertakers employed a contractor or carrier to carry goods from the factory to another place, it cannot have been intended to include workmen employed on such work, although it may be said to relate to the work carried on at the factory. Nor can the word have the meaning merely of proximity, for that would give the word too wide an effect, by including, for instance, the case of a cart that had loaded and started but had not got very far, or the case of a cart of the undertakers passing the factory in going between places where the employers were working. Where the liability of the employers is extended beyond their own premises the intention that this should be so is expressed, as in the case of a workman employed in a shipbuilding yard: s. 7, sub-s. 3. The word should be treated as indicating the intention to include in the Act, not merely the factory itself, but any part of the premises on which it stands, and also the case of a workman employed in the work of the factory and in proximity to the factory; and this interpretation is equally applicable to a railway, a mine, and the other places mentioned.

Ruegg, *Q.C.*, and *A. P. Thomas*, for the respondent, were stopped.

A. L. SMITH L.J. I think that the judgment appealed from was correct. It is said on this appeal that the case has not

been brought within s. 7, sub-s. 1, of the Act, because the deceased was not in the employment of the defendants "on in or about" a factory within the terms of that section. The evidence is that there was a factory and a place where timber was habitually loaded from that factory. True this place is not inside the factory, nor is it on the factory premises, but it is just outside them, and, according to the undisputed facts, it is a place which is habitually used when goods are being taken from the factory to be sold or taken away. The deceased was in the employment of the factory owners, and was loading on a cart goods brought from the factory. He was as much engaged on the business of the factory as if he had been carrying the timber to stow it on the cart, and it seems to me the argument as to a carrier has nothing to do with the facts of this case. The question arises, what meaning is to be attached to the words "on, in, or about" used in this section? It is obvious that the Legislature thought that the first two words were not large enough to cover all that they intended to include, and they therefore added the word "about," which is clearly an enlarging word. In my view, that word means that the employment may be in close propinquity to the factory, and whether that was so in any particular case is a question of fact to be determined by the tribunal before which the claim comes. The judge in this case has found that the deceased was employed "about" the factory, and this brings the case within the statute. The decision of the learned judge must stand, and this appeal be dismissed.

RIGBY L.J. concurred.

COLLINS L.J. I am of the same opinion. The accident certainly was one "arising out of and in the course of the employment" of the deceased. By s. 7, sub-s. 1, of the Act it is made to apply only to employment by the undertakers, in this particular case, "on in or about" a factory. I agree that the business carried on at this factory did embrace, as part of or as a process in the trade or business carried on, the stowing of timber, taken from the factory, into carts owned by

C. A. 1898

POWELL v. BROWN.

Collins L.J.

the factory owners, and it was in the course of that operation that the accident took place, while the cart was physically contiguous to the factory. Without limiting the use of the word "about" to physical proximity, I think it certainly includes that. The word is put there to cover something that would not be covered by the words "on or in." I do not say that it may not also have an added meaning in relation to the particular business; but that does not arise in this case, because we have the finding in point of fact, and the facts do not admit of any other view, that the accident was one "arising out of and in the course of the employment." The deceased was doing the very business which was the business of the factory. I think, therefore, the decision appealed from was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Walker, Son & Field, for Weightman, Pedder & Weightman, Liverpool.*

Solicitors for respondent: *Pritchard, Englefield & Co., for J. H. Glover, Liverpool.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1898
Aug. 2, 3;
Nov. 30.

BONNER AND ANOTHER *v.* TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Lease—Sub-lease by Assignee—Liability of Sub-lessee—Rent reserved by original Lease—Payment by Lessee—Indemnity—Money paid.

The lessees of premises having assigned the term, the assignee mortgaged the premises by way of sub-demise. The mortgage provided that, upon default by the mortgagor, the mortgagees might enter into possession, or receipt of the rents and profits of the premises, and demise or sell the same, and out of moneys so received by them, whether as rents and profits or purchase-money, should in the first place pay the rent reserved by the original lease. The mortgagees, having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the mortgagees to recover the amount so paid by them.

Held, that the action was not maintainable.

Moule v. *Garrett*, (1870) L. R. 5 Ex. 132; (1872) 7 Ex. 101, distinguished.

APPEAL from the judgment of Channell J. in an action tried by him without a jury.

The action was brought by the plaintiffs, who were lessees of certain premises, to recover from the defendants, who were mortgagees of the premises by way of sub-demise from one Price, to whom the plaintiffs had assigned the term, the amount of rent which the plaintiffs had been compelled to pay to the lessor and which had accrued while the defendants had been in possession of the premises.

By indenture of lease dated April 3, 1882, the premises, numbered 12 and 14, Lordship Lane, Tottenham, were demised by one Moore to the plaintiffs at the yearly rent of 20*l.*, payable quarterly, for a term of ninety-nine years. The lease contained the usual covenants for payment of the rent reserved, repair, and insurance by the lessees, and a condition of re-entry for non-payment of rent or breach of covenant. By indenture dated April 5, 1889, the plaintiffs assigned the premises for the remainder of the term to Edward Price, who by the said

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

indenture covenanted with the plaintiffs to pay the rent reserved by the lease, and indemnify the plaintiffs therefrom. By an indenture dated October 18, 1889, which recited that Price had applied to the defendants' society to lend him 400*l.* in respect of his forty advanced shares therein for the term of fifteen years, and had offered to pay a premium for that advance which, being calculated according to the rules of the society, amounted to 60*l.*, and was to be added to and treated as part of the principal sum advanced, it was witnessed that, in consideration of the sum of 400*l.* paid to Price by the defendants, he demised the above-mentioned premises to the defendants for the residue of the term granted by the lease, except the last day, by way of mortgage for securing to the defendants the payment by him of 180 advance instalments of 3*l.* 14*s.* each, one of such instalments to become due and be paid on the first Monday in every month, commencing with the month of December then next, and also the payment of all fines and other sums, if any, which, according to the rules of the society, might become payable by him to the defendants. The deed provided for the mortgagor's remaining in possession until default by him in payment of any instalment or fine, or in payment of the rent reserved by the lease under which he held the premises, and that, if such default should be made, the defendants might distrain for the amount of any monthly payments or fines in arrear, and of any payment made by the defendants under the powers by the deed conferred upon them, as for rent in arrear upon a common demise, or enter into possession of, or receipt of the rents and profits of, the premises, and might demise or sell the premises, and should out of the moneys so received by them, whether the same were rents and profits or purchase-money, in the first place pay the rent reserved by the lease under which the mortgagor held the premises, and certain other expenses thereby specified, and in the next place retain for the society all advance instalments, fines, and other moneys which under the deed or the rules of the society were then due to them from the mortgagor, and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by

the mortgagor in case he were about to redeem, and should pay the surplus, if any, to the mortgagor. On November 13, 1891, Price was adjudicated bankrupt. The defendants entered into possession of the premises, and had continued in possession ever since. The defendants not having paid rent reserved by the original lease during the time they were so in possession to the amount of 97*l.* 0*s.* 5*d.* the plaintiffs were compelled to pay that rent to the lessor. The learned judge gave judgment for the defendants.

Aug. 2, 3. *Bray, Q.C.*, and *H. Tindal Atkinson*, for the plaintiffs. The plaintiffs have been compelled to pay that which the defendants by the terms of the instrument under which they held the premises ought to have paid, and the defendants have had the benefit of that payment; for, in the absence of it, the term, upon which their interest in the premises depended, might have been forfeited. The defendants really took the premises subject to the charge of paying this rent, and it is by reason of their default that this burthen has fallen upon the plaintiffs. The case therefore falls within the proposition laid down by Cockburn C.J. in *Moule* v. *Garrett* (1) to the effect that, "where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid." It is not necessary in a case of this description that there should be between the parties either privity of contract or privity of estate in the sense that the defendants must have the same estate as the plaintiffs had. It is sufficient that the plaintiffs were compellable and have been compelled to pay a sum of money through the default of the defendants, which payment has enured for the defendants' benefit. In such a case the law, in order to do justice, implies a request by the defendants to the plaintiffs to make the payment, which was for the defendants' benefit, and a promise by the defendants to repay the plaintiffs. There was neither privity of contract nor privity of estate between the plaintiffs and the defendants in *Moule* v. *Garrett*. (2)

(1) L. R. 7 Ex. 101. (2) L. R. 5 Ex. 132; 7 Ex. 101.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

[They also cited *Sapsford* v. *Fletcher* (1); *Exall* v. *Partridge* (2); *Crouch* v. *Tregonning* (3); *Taylor* v. *Zamira* (4); *Penley* v. *Watts* (5); *Dawson* v. *Linton* (6); *Edmunds* v. *Wallingford.* (7)]

Jelf, Q.C., and *Grimwood Mears* (*G. Spencer Bower* with them), for the defendants. There must be some privity either by contract or estate between the plaintiffs and defendants in order to support such an action as this. It is essential to the right to indemnity in such a case that the defendants and the plaintiffs should have been both compellable by law to pay the same debt to the same person, and that the defendants should, as between themselves and the plaintiffs, be the parties primarily liable, the payment being thus for their benefit. In *Moule* v. *Garrett* (8) the defendants were assignees of the term, not sub-lessees, and therefore the plaintiff as lessee, and the defendants as assignees of the term, were both liable to pay the rent, the one by contract and the other by estate; and there was privity of estate in the sense that the defendants had the estate which had belonged to the lessee. Here the defendants have not the same estate as the plaintiffs had, and the plaintiffs are not parties to the contract by which the defendants undertook to pay rent. No request can be implied by the defendants to the plaintiffs to pay the rent due on the original lease, which the defendants were not liable to the lessor to pay.

[They also cited *England* v. *Marsden* (9); *Deering* v. *Winchelsea.* (10)]

H. T. Atkinson, in reply.

Cur. adv. vult.

Nov. 30. A. L. SMITH L.J. read the following judgment:— This is an action by plaintiffs who are lessees of premises for a long term to recover from the defendants 97*l.*, being rent they

(1) (1792) 4 T. R. 511.
(2) (1799) 8 T. R. 308.
(3) (1872) L. R. 7 Ex. 88.
(4) (1816) 6 Taunt. 524.
(5) (1841) 7 M. & W. 601.
(6) (1822) 5 B. & A. 521.
(7) (1885) 14 Q. B. D. 811.
(8) L. R. 5 Ex. 132; 7 Ex. 101.
(9) (1866) L. R. 1 C. P. 529.
(10) (1800) 2 B. & P. 270.

have had to pay to their lessor under the covenant in their lease, which rent accrued during the time the defendants were in possession of the premises as mortgagees by way of demise from an assignee of the term. Between the plaintiffs and the defendants there exists neither contract nor privity of estate; the defendants were not liable to pay to the plaintiffs the rent in question, nor were they liable to pay it to the plaintiffs' lessor. In these circumstances my brother Channell gave judgment for the defendants, being of opinion that the action was not maintainable, and that the principle of the decision in *Moule* v. *Garrett* (1) did not apply, the defendants being underlessees and not assignees of the term as in the case cited. My brother Channell held, as I read his judgment, that no request by the defendants to the plaintiffs to pay their lessor the rent in question on their behalf could be implied whereon to maintain the action, and I am of opinion that he was right.

The facts are these. On April 3, 1882, the owner of the premises, Moore, demised them to the plaintiffs for a term of ninety-nine years at the rent of 20*l.* per annum, which the plaintiffs covenanted to pay. On April 5, 1889, the plaintiffs assigned to Price the residue of the term, Price covenanting with the plaintiffs to pay the covenanted rent and indemnify the plaintiffs therefrom. On October 18, 1889, Price demised by way of mortgage the term less one day to the defendants to secure advances made by them to him, and the defendants covenanted with Price that, if they should enter into possession of the premises and receive the rents and profits, they would pay the yearly rent of 20*l.* per annum reserved by the lease of April 3, 1882. In November, 1891, Price was adjudicated bankrupt. The defendants have entered into possession of the premises under their mortgage, and have received the rents and profits thereof in part satisfaction of their mortgage debt, and they have remained in possession ever since. The defendants have not paid the rent which accrued whilst they were in possession, and Moore, the landlord, has compelled the plaintiffs, his lessees, under the covenant in their lease with him to do so;

(1) L. R. 5 Ex. 132; 7 Ex. 101.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

A. L. Smith L.J.

they have done so, and they now sue the defendants to recover the amount they have thus had to pay to Moore.

It is clear that no contract or privity of estate exists between the plaintiffs and the defendants, or between the original lessor, Moore, and the defendants; and, unless there be circumstances from which a request to pay can be implied, or, in other words, a contract can be implied between the defendants and the plaintiffs that the defendants would indemnify the plaintiffs if they paid to their landlord the rent accruing whilst they, the defendants, were in possession, there are no circumstances which will support an action by the plaintiffs against the defendants to recover the amount so paid. It is true that Moore could sue the plaintiffs, his lessees, upon their covenant with him in the lease. It is also true that the plaintiffs, the lessees, could sue their assignee, Price, upon his covenant with them. It is also true that Price could sue the defendants, his underlessees, upon their covenant with him. But how can the plaintiffs sue the defendants? I omit Price's trustee in bankruptcy, for he, in my opinion, does not affect this case. It is said that the case of *Moule* v. *Garrett* (1) shews that the plaintiffs can sue the defendants to recover what they have been compelled to pay to their lessor, and that this case falls within the principle of that case. Now what was the case of *Moule* v. *Garrett* (1)? It was a case in which there had been two assignments of the term, the defendants being the second assignees thereof. First of all there was, as here, a lease from a lessor to the lessee, Moule, the plaintiff in the action, containing the usual covenants by a lessee. Moule afterwards assigned the term to Bartley, who afterwards assigned the term to the defendants, Garrett & Co., who then committed breaches of covenants in the lease. Moule, having been compelled under his covenant with his lessor to pay to him damages for these breaches committed by the defendants, Garrett & Co., the assignees of Bartley, sued Garrett & Co. to recover the amount so paid by him, Moule, to his lessor. It was held that, inasmuch as both the plaintiff and the defendants were compellable to pay to the original lessor the damages accruing to him for the breaches

(1) L. R. 5 Ex. 132; 7 Ex. 101.

of covenant by the defendants whilst assignees of the term, the former by reason of his covenant with the original lessor and the latter by reason of their being assignees of the term and having committed the breaches whilst assignees, and inasmuch as the plaintiff had been compelled to pay damages to his lessor for these breaches of covenant by the defendants, for which the defendants were also compellable under privity of estate to pay to the lessor, they, the defendants, were liable to indemnify the plaintiff in respect of these payments of which the defendants had had the benefit. For, as Willes J. puts it in *Roberts* v. *Crowe* (1), the lessee is liable for breaches of covenant committed by the assignee, but being only secondarily liable he has his remedy over against the person primarily liable—that is, the assignee. The ratio decidendi of *Moule* v. *Garrett* (2) is this: If A. is compellable to pay B. damages which C. is also compellable to pay B., then A., having been compelled to pay B., can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his ease. In other words, A. can call upon C. to indemnify him. See the notes to *Lampleigh* v. *Brathwait* (3), and cases there cited. To raise this implied request, both A. and C. must, in my judgment, be compellable to pay B.; otherwise, as it seems to me, the payment by A. to B. so far as regards C. is a voluntary payment, which raises no implication of a request by C. to A. to pay. If Cockburn C.J., in his alternative reason in *Moule* v. *Garrett* (4) for holding the defendants liable meant this by the expression "by the legal default of another," I agree; but, if it means by a default for which they were not compellable to pay in that case to the original lessor, I do not agree, and none of the other learned judges who decided that case adopted what Cockburn C.J. then said, and, indeed, Willes J. expressly points out that the obligation of the contract must be common to the plaintiff and the defendant, and that the whole benefit was taken by the defendants. In the present case the defendants are under-

(1) (1872) L. R. 7 C. P. 629, at p. 637.

(2) L. R. 5 Ex. 132; 7 Ex. 101.

(3) 1 Sm. L. C. 9th ed. p. 160.

(4) L. R. 7 Ex. 101.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

A. L. Smith L.J.

lessees of an assignee of the term, and are not liable at all to the original lessor for rent whenever it accrued, there being between them and the original lessor neither contract nor privity of estate, and there is no suggestion that there were goods upon the demised premises available for distress other than the goods of the mortgagor Price, even if this would have sufficed to maintain the action, about which I say nothing, for it is not before me. The above, in my judgment, is what was decided in *Moule* v. *Garrett* (1), and the present case, as it appears to me, is an attempt to stretch the decision of that case, and to say that the principle therein laid down applies equally to the case of an underlessee of an assignee who is not compellable to pay the original lessor as to the case of an assignee who is compellable to pay the original lessor. It will be seen upon looking at the case of *Penley* v. *Watts* (2) that Parke B. deals with this exact point. He says: "The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee, but that is not the case in a sub-lease." And, again, in *Moule* v. *Garrett* (3), in the Exchequer Chamber, when it was suggested that the case of an underlessee of an assignee and an assignee of an assignee were the same, Blackburn J. said: "No, because the underlessee has never come under any obligation to the lessor, but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation," and this is the foundation of the judgment of the Court of Exchequer delivered by Channell B., and the ground upon which the judgment was upheld in the Exchequer Chamber. The fact that in this case the defendants covenanted with Price, the assignee, that if they, the defendants, became mortgagees in possession they would pay the rent, gives Price a remedy against them subject to any set-off which may exist between him and them and does not give the present plaintiffs a right of action against them.

In my judgment, for the reasons above, this action is not maintainable. I agree in the judgment of my brother

(1) L. R. 5 Ex. 132; 7 Ex. 101. (2) 7 M. & W. 601, at p. 608.
(3) L. R. 7 Ex. 101, at p. 102.

Channell and think that this appeal must be dismissed with costs.

RIGBY L.J. read the following judgment:—The only question in this case is as to the liability of the defendants, who are mortgagees by sub-lease of an assignee of a lease originally granted to the plaintiffs, to indemnify the plaintiffs in respect of rent recovered by the lessor against them on their covenant in the lease. The mortgagees entered into possession of the leasehold property by virtue of their sub-term in 1890, and the assignee became bankrupt in 1891.

Now primâ facie a sub-lessee of a lessee or assignee of a term comes under no liability to the original lessor either for payment of rent or performance of covenants in the original lease. This is true whether the sub-lease be by way of sale or by way of mortgage, and entry into possession of the sub-term does not make the sub-lessee liable to the lessor. But it is said that the present case is distinguishable from the ordinary case by the fact that the mortgagees expressly covenanted with their mortgagor (assignee of the lease) that, if they entered into possession, they would out of the rents and profits received by them (among other things) pay the rent, and that they have been, as they have, in possession during the whole time during which the rents recovered by the lessor against the plaintiffs, original lessees, have been accruing. The argument is that they are thus placed in the position of the defendants in *Moule* v. *Garrett* (1), who were held liable to repay to the plaintiff money which the latter had been compelled to pay to the original lessors for breach of covenant in the original lease. In that case the plaintiff, like the plaintiffs here, was an original lessee who had assigned the term before the breach on which he was sued; but the defendants were not, like the defendants here, holders of a sub-term, but were the actual holders at the time of the breach by puisne assignment of the whole of the original term, and in that capacity liable by privity of estate to the original lessors for the very damages which had been recovered by them against the original lessee, who in the action was

(1) L. R. 5 Ex. 132; 7 Ex. 101.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Rigby L.J.

seeking to recover them over. Both plaintiff and defendants were under a direct obligation to pay the rent to the lessors; but the defendants reaped all the benefit of the payment. It was treated as plain that, as between the plaintiff and defendants, the liability of the defendants to the original lessors by privity of estate was in the nature of a primary liability, that of the plaintiff by privity of contract being secondary; and on this ground the plaintiff was held entitled to recover over against the defendants, as though he were in a manner surety for them for payment of their debt. Here there is no privity either of estate or contract between the defendants and either the original lessor or the plaintiffs in this action, so that there can be nothing analogous to the relation of principal and surety between them. The reasoning in *Moule* v. *Garrett* (1), therefore, has no application.

If the assignee had been solvent, the plaintiffs would have had a sufficient remedy in recourse to him. The fact of his having become bankrupt can give no right of action against the defendants on the principle of *Moule* v. *Garrett* (1) which did not otherwise exist. The Legislature has made provision in the Bankruptcy Acts for the adjustment of rights of bankrupt holders of leases and other parties interested; and it is in Bankruptcy, if anywhere, that the plaintiffs must find their remedy.

VAUGHAN WILLIAMS L.J. read the following judgment:— In this case Moore, by an indenture of lease dated April 3, 1882, let to the plaintiffs two houses numbered 12 and 14, Lordship Lane, Tottenham, at the yearly rent of 20*l.* The plaintiffs on April 5, 1889, assigned the term to Edward Price, who covenanted to pay the rent of 20*l.* a year reserved by the lease of April 3, 1882, and to indemnify the plaintiffs therefrom. By an indenture of mortgage dated October 18, 1889, Price, in consideration of the sum of 400*l.* lent him by the defendants, the Tottenham and Edmonton Permanent Investment Building Society, demised to the defendants the said houses for the remainder of the said term of ninety-nine years, except the last

(1) L. R. 5 Ex. 132; 7 Ex. 101.

day of such term, by way of mortgage for securing to the society the payment by the mortgagor of one hundred and eighty advance instalments of 3*l.* 14*s.* each, payable monthly, and all fines and other sums which, according to the rules of the society, might become payable by him. The mortgage deed provided for the mortgagor remaining in possession until default by the mortgagor in the payment of the instalments and fines, or in the payment of the rent reserved by the lease under which the mortgagor held, and that, if such default should be made, the society might distrain for the amount of the monthly payments and fines, and the amount of any payments made by the society under the powers thereby conferred upon them, as for rent in arrear upon a common demise, and might enter into possession of the premises or the rents and profits thereof, and might demise or sell the premises, and should, out of moneys so received by them, whether the same were the rents and profits or purchase-money, pay in the first place the rent reserved by the lease under which the mortgagor held, and in the next place retain for the said society all advance instalments, fines, &c., and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by the mortgagor in case he were about to redeem, and pay the surplus, if any, to the mortgagor. Price has become bankrupt, and the defendants have gone into possession. There is no evidence what rents, profits, or proceeds they have actually received. The only remaining fact is that the plaintiffs have been called on to pay, and have paid, the principal rents since April, 1892.

The question raised in this case, namely, whether an underlessee, who is a mortgagee by way of demise from an assignee of the lessee, and who is in possession of the demised lands, can be sued for money paid by the lessee, who has been compelled according to his covenant to pay the rent reserved by the principal lease, has not, so far as I know, been directly determined until now. It is plain that, generally speaking, an underlessee, whether holding of the lessee or of the assignee of the lessee, cannot be under any obligation to indemnify the lessee against the claim of the lessor for the rent reserved by

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Vaughan Williams L.J.

the lease, because the underlessor generally is presumed to indemnify the underlessee against the rent payable by the principal lease: see *Jones* v. *Morris* (1): and the payment of the rent would not therefore be for his relief. The case of *Moule* v. *Garrett* (2) does not determine the question, although it goes far to define the principles upon which the question must be decided. In *Moule* v. *Garrett* (2) the defendants were not underlessees, but assignees of the term, and the ground upon which they were held to be liable was that, the lessee and the defendants both being liable to the lessor upon all the covenants in the lease, which ran with the land, the former by contract and the latter by privity of estate, the defendants, having had the whole benefit for which the covenant was entered into by the plaintiff as lessee, were liable to recoup to the plaintiff the amount which he had been compelled to pay the lessor for breaches of covenant occurring during the defendants' possession. Channell B. in delivering the judgment of the majority of the Court says: "It is true that there is no express covenant between the parties, but they are each liable to the lessor for the performance of the covenants; they are each directly liable, and the lessor may sue either at his option; but the assignee having at the time the estate which has been the consideration for the covenants ought, as between himself and the lessee, to perform them"; and in *Moule* v. *Garrett* (3) in the Exchequer Chamber Blackburn J. says, "I express my entire concurrence in what fell from Channell B."; and Willes J. says: "I concur upon the ground that where two parties have become bound, the one by contract and the other by estate, to perform the same covenant, the former is entitled to indemnity against the latter to the extent of his interest, although there is no immediate privity of contract between them; and I think that the defendants are liable in this action by reason of their having had the whole benefit for which the covenant was entered into by the plaintiff as lessee. The principle of the decision in *Deering* v. *Earl of Winchelsea* (4) appears to

(1) (1849) 3 Ex. 742.
(2) L. R. 5 Ex. 132; 7 Ex. 101; 39 L. J. (Ex.) 69; 41 L. J. (Ex.) 62.
(3) 41 L. J. (Ex.) 62.
(4) 2 Bos. & P. 270.

govern the case." Cockburn C.J. bases his judgment on precisely the same ground, but adds: "there is another ground upon which the judgment of the Court below may be upheld, namely, that the premises, the subject-matter of this lease, being in the possession of the defendants, they were the parties whose duty it was to perform the covenants to be performed upon and in respect of those premises, and whose immediate duty it was to keep those premises in repair. By reason of their default the plaintiff, the original lessee, became liable (although he had parted with the estate) by the terms of his covenant to make good to his lessor the damage which had arisen from the default of the defendants; and I take it to be a general proposition applicable to such a case as this, that, where one man is compelled to pay damages by reason of the default of another, he is entitled to recover compensation from the person through whose default that damage is occasioned. The reason for this rule appears to be well stated in Mr. Leake's excellent work on Contracts." (1) The passage referred to runs thus: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount." Now what (according to the judgments of Channell B., Blackburn J., and Willes J.) were the conditions upon which the liability of the defendants to the plaintiff was based? First, that the plaintiff and defendants were both liable to be sued by the lessor for the same breaches of the same covenant. Secondly, that the defendants had had at the date of those breaches the whole benefit of the land the subject of the lease containing that covenant.

These being the conditions upon which the defendants in *Moule* v. *Garrett* (2), the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from underlessees of an assignee

(1) 1st ed. p. 41.

(2) L. R. 5 Ex. 132; 7 Ex. 101.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Vaughan Williams L.J.

of the lease, who are in possession as mortgagees. Now first, as to the common liability of the lessee and underlessee, they clearly are not both liable to be sued by the lessor for rent. The lessee alone can be sued, and the underlessee is only liable to the lessor in the sense that the lessor has a remedy in rem by distress on goods on the property demised and by the power of re-entry for non-payment of rent or breach of covenant. It is in this sense only that the underlessee can be said to be liable to the lessor for the rent, and, so far as distress is concerned, his direct liability is limited to cases in which he happens to have goods on the land, although he may have an indirect liability to indemnify against distress those who by his licence having goods on the land have been compelled to redeem their goods from distraint. Is this a common liability within the reason upon which the condition is based? I think it is not. I am now dealing only with the principle upon which the common law liability is based. There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued. The two principles are well illustrated by the case of *Hunter* v. *Hunt* (1) and the observations of Eyre C.B. in *Deering* v. *Winchelsea*. (2) The former was a case in which one underlessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under

(1) (1845) 1 C. B. 300.

(2) 2 Bos. & P. 270.

threat of distress, brought an action against an underlessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case, the Lord Chief Baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases, in some of which the defendant seems to have been under no liability to be sued, but in which the goods of one had been legally taken or sacrificed for the benefit, not of himself alone, but of himself and others, and says, that "the reason is that they are all in æquali jure, and, as the law requires equality, they shall equally bear the burden. This is considered as founded in equity. The principle operates more clearly in a court of equity than at law. At law the party is driven to an audita querela or scire facias to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law." The audita querela, which is a defendant's writ, and the scire facias both assume a legal liability to judgment or execution in some person other than him against whom judgment has been obtained. The case also of *Leigh* v. *Dickeson* (1), in which it was held that one tenant in common of a house who expends money upon the repairs of the house has no right of action against his co-tenant in common for contribution in respect of money so expended, is based upon the consideration that there is no common liability to repair, and seems further to shew that in equity as well as at law there must at least be a legal liability on the plaintiff to pay the sum or bear the burden in respect of which he seeks recoupment or contribution from the defendant. This seems to me to account for the common law condition that the defendant cannot be liable to be sued for money paid unless he is personally liable to be sued for the money which the plaintiff claims to have paid to his use. The common law condition may also be explained by reference to the form of action, "money paid to the use of the defendant at his request," for it seems that, unless the defendant is under a personal liability to pay the money which the plaintiff has

(1) (1884) 15 Q. B. D. 60.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Vaughan Williams L.J.

assumed to pay for him, one cannot imply the authority from the defendant to the plaintiff to make the payment on his behalf. This proposition does not of course extend to cases where the contractual relation of the parties, whether by express contract or by contract to be implied from their dealings with one another, raises a request or authority to pay, but otherwise I believe it of universal application in an action for money paid: see *Lewis* v. *Campbell*. (1) For these reasons I think that the right of the lessor to distrain or re-enter does not constitute a liability in the underlessee to the lessor within the meaning of the condition of the common law principle. But the plaintiff may be entitled to recover within the equitable principle, if he has been compelled to pay or bear the burden, and can establish that the defendant has such an interest or benefit as to make the maxim apply "Qui sentit commodum sentire debet et onus"; but in my judgment an underlessee has no such interest in the lease or benefit from the payment of the rent as to make that maxim apply or to bring him within the equitable principle. The equitable principle seems to me based upon natural justice requiring that equity should neutralise "inter se" the accident that the burden has been borne by one for the benefit of others associated with him in interest, whether such incidence of burden is the result of election of a plaintiff who might have sued all those interested, or whether it is the result of the requirements of the law as to the parties to actions, or whether it is the result of what may be more properly called "accident" like the "jettison" of a part of a cargo severally owned, or the seizure of wines on behalf of the Crown in right of prisage. In each of these cases the application of the equitable principle depends on community of interest in something in respect of which one has borne a burden for the benefit of another or others. The covenant in accordance with which a lessee pays rent or expends money in repairs is a covenant in a lease in which the underlessee has no interest. He has no contractual interest, and no estate is vested in him; the only sense in which it can be said that he has an interest in the lease is that the lessee or assignee of the

(1) (1849) 8 C. B. 541, at p. 549.

lease who has granted the underlease cannot defeat his own grant by a collusive surrender of the lease to the original lessor; and it does not seem to me that this fact constitutes such an interest in him that he can within the equitable principle be said to have an interest in the lease containing the covenant under which the lessee is compellable to do the act alleged to have been done for the benefit of the underlessee. The case of the assignee of a lease on the contrary does shew the necessary interest, as is well illustrated by the judgment of Popham C.J. and the whole Court in the Dean and Chapter of Windsor's case, quoted by Tindal C.J. in *Tremeere* v. *Morison* (1), "that the action of covenant did lie although the lessee had not covenanted for him and his assigns; for such covenant which extends to the support of the thing demised is quodammodo appurtenant to it and goes with it: And in respect the lessee hath taken upon him to bear the charges of the reparations the yearly rent was the less which goes to the benefit of the assignee and qui sentit commodum sentire debet et onus." It may be remarked on this passage that the rent payable by the underlessee has no necessary relation to the rent reserved by the lease.

In conclusion, in my judgment the defendants have not, within either the equitable or common law principle, such an interest in the lease that it can be said that the payment by the lessees of the rent reserved by the lease was a payment for their benefit or relief, and I do not think that it makes any difference that the underlease was in fact a mortgage by demise.

The only other question with which I have to deal is the question whether there is anything in the provision in the underlease or mortgage by demise, for the application of the rents and profits to the payment of the rent reserved by the lease in case the mortgagees go into possession, which will enable the plaintiffs to maintain this action. I think not. It is plain that, apart from the provision for the application of rents and profits, an underlessee who has bought an interest by way of underlease from an assignee of the lease by the

(1) (1834) 1 Bing. N. C. 89, at p. 98.

C. A. 1898

BONNER v. TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Vaughan Williams L.J.

payment of a lump sum cannot, according to any principle, be called on to pay again for that for which he has already once paid, by indemnifying the lessee against the periodical rent as it accrues from time to time. Now, so far as the clause for the application of the rents and profits is concerned: first, it is plain that the lessee cannot at law take advantage of a contract to which he is not a party. It may be true that the trustee in Price's bankruptcy, who does not seem to have disclaimed, may be entitled to compel application of the rents, profits, and proceeds to the payment of the paramount rent, as being a fund held by the defendants in trust for that purpose, and the plaintiffs are, I think, entitled to insist upon the trustee in Price's bankruptcy on proper terms taking proceedings to enforce the application of the fund; but I do not think that the lessees can, at all events in this action, as framed and with these parties, enforce that trust. It is not as if the defendant society was in course of liquidation, and the lessees were attempting to carry in a proof to enforce the indemnity due from the estate to their debtor. It is sufficient, however, to say that the judgment of Channell J. in the action before him was quite right, and that the plaintiffs cannot in it recover any indemnity from the defendants.

With regard to the second ground upon which Cockburn C.J. based his judgment in *Moule* v. *Garrett* (1), I do not think that it is anything more than a statement of the principle of *Deering* v. *Winchelsea* (2), which principle is the foundation of all the cases in which the assignee has been held liable to recoup a lessee who has been compelled to pay rent as it were as surety for the assignee.

It seems to me that no injustice is done to the plaintiffs by holding that they must fail in this action, for I am of opinion that, if they take proper steps against the trustee in bankruptcy, they can in effect recover this rent from the defendants, provided the state of things is such that the trustee can compel the defendants to apply moneys received to the payment of these rents in arrear; and moreover, as the trustee has not disclaimed, they have, it seems, a remedy against the trustee

(1) L. R. 7 Ex. 101; 41 L. J. (Ex.) 62. (2) 2 B. & P. 270.

personally as an assignee of the lease in respect of such rents as have accrued since the bankruptcy, unless and until the trustee assigns over. I have only to add with regard to the cases of *Sapsford* v. *Fletcher* (1), *Taylor* v. *Zamira* (2), *Dawson* v. *Linton* (3), and *Exall* v. *Partridge* (4), which were cited to us, that each of these cases turned really on the contractual relations of the parties.

Appeal dismissed.

Solicitor for plaintiffs: *Albert Saunders.*

Solicitors for defendants: *Howard & Shelton, for C. E. Burrows, Tottenham.*

E. L.

[IN THE COURT OF APPEAL.]

THE LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION *v.* SEDGWICK.

Insurance, Marine—Reinsurance—"Subject to same terms as Original Policy"—Policies in existence at Date of Reinsurance—Policies coming into existence subsequently—Limit of Liability of Reinsurer.

A time policy of insurance on a ship was expressed to be "a reinsurance of policy or policies" (here there was a blank space not filled in) "and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the reinsurance was effected. Subsequently, during the currency of the reinsurance policy, the two other policies came to an end, and he underwrote a fresh time policy of insurance of the same subject-matter, differing as to the valuation of the ship and in other respects from the two earlier policies. A loss occurred and was paid under the fresh policy:—

Held, that the original policies referred to in the reinsurance policy were the policies then in existence, and that the liability of the reinsurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions, and clauses as the original policies.

Judgment of Kennedy J., [1898] 1 Q. B. 739, reversed.

APPEAL from a judgment of Kennedy J., reported [1898] 1 Q. B. 739.

The action was brought to recover back money paid by the

(1) 4 T. R. 511.
(2) 6 Taunt. 523.
(3) 5 B. & A. 521.
(4) 8 T. R. 308.

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

plaintiffs to the defendant under a policy of reinsurance on the ship *Collynie*.

On February 20, 1896, the defendant with six others subscribed, for 50*l*. each, a policy of insurance of that date, "upon all kinds of goods and merchandises, and also upon the body, tackle, apparel, &c., of and in" the steamship *Collynie*, lost or not lost, for and during the space of twelve calendar months from the same date.

The amount insured was 350*l*. A clause of the policy provided that "the said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at—on hull valued at 3600*l*., machinery valued at 2000*l*." The premium was at the rate of nine guineas per cent. The "time clauses" attached to the policy provided for returns of premium thus: "15*s*. per cent. for each uncommenced month if this policy be cancelled. As follows, for each consecutive 30 days the vessel may be laid up in port, viz., 14*s*. per cent. if in the United Kingdom not under average, 12*s*. 6*d*. per cent. under average, or if abroad."

On June 20, 1896, the defendant, with six others, subscribed for 25*l*. each, a further policy of insurance of that date on the *Collynie* for twelve calendar months from the same date. This policy was identical in terms with the policy of February 20, except that the amount insured was 850*l*.

By a policy of reinsurance, dated November 27, 1896, the defendant, with six others, effected an insurance for 250*l*., lost or not lost, with the plaintiffs "for and during the space of time commencing November 4, 1896, and ending June 20, 1897, both days inclusive, as employment may offer . . . . upon any kinds of goods and merchandises, and also upon the body, tackle, apparel, &c., and other furniture of and in the ship *Collynie*, being a reinsurance of policy or policies,

and subject to the same terms, conditions, and clauses as original policy or policies whether reinsurance or otherwise, and to pay as may be paid thereon. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the association in this

policy, are and shall be on hull and machinery valued at 5600*l.*" The blank in this clause was not filled in. The premium was at the rate of ten guineas per cent. In the slip the insurance was stated to be on the hull, &c., of the *Collynie* valued at 5600*l.*; the words "time clauses as original" followed, and there was a printed clause at the foot: "In the event of any inaccuracy in description of voyage, interest, name of vessel, clauses or conditions, it is agreed to hold the assured covered at a premium to be arranged."

On February 20, 1897, the policy of February 20, 1896, expired by effluxion of time, and the policy of June 20, 1896, was cancelled, and the proportionate amount of premium therefor was returned to the assured thereunder. This cancellation was unknown to the plaintiffs, and without any notice to them. Those policies had not been seen by the plaintiffs, nor had they asked to see them.

On the same February 20, 1897, the defendant, with eight others, subscribed, for 50*l.* each, a policy of insurance for 1040*l.* on the *Collynie*, lost or not lost, for twelve calendar months from that date. The valuation clause was: "The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at—on hull and machinery—5000*l.*" The premium was at the rate of ten guineas per cent. The time clauses provided for the following returns of premium: "16*s.* 8*d.* net per cent. for each uncommenced month if this policy be cancelled. As follows, for each consecutive 30 days the vessel may be laid up in port, viz., 15*s.* 8*d.* net per cent. if in the United Kingdom not under average, 14*s.* 2*d.* net per cent. under average, or if abroad." In all other respects this policy was in the same terms as the policies of February 20 and June 20, 1896.

On May 3, 1897, the *Collynie* was totally lost. Defendant and his co-subscribers of the policy of February 20, 1897, paid for a total loss under that policy. The plaintiffs paid the defendant for a total loss under the reinsurance policy of November 27, 1896, without asking for production of original policies.

C. A.
1898
LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

The plaintiffs, on November 30, 1896, had reinsured their liabilities under the reinsurance policy of November 27. When they sought to recover from their reinsurers, the latter required to be shewn the original policies, and the plaintiffs then ascertained the facts with respect to the cancellation and expiration of the policies of February 20 and June 20, 1896, and the substitution of the policy of February 20, 1897. This action was brought to recover the moneys paid by the plaintiffs to the defendant, as being paid without consideration and in the mistaken belief that they were due.

The case was tried before Kennedy J., who gave judgment for the defendant. (1)

The plaintiffs appealed.

1898. Nov. 10. *English Harrison, Q.C.*, and *Carver, Q.C.* (*Hurst* with them), for the plaintiffs. The original policies referred to in the reinsurance policy were those in existence at that time and capable of being identified. This is shewn by the date at which the reinsurance policy is to expire coinciding with that of one of the policies in existence when it was made and by the valuation, which is the same as in the other two policies though expressed in one sum. It is also evidenced by the words in the slip, "Time clauses as original," and the provision for inaccuracies of description. It is said that the word "original" might apply to a subsequent policy in force when the loss takes place; but it is unnecessary so to apply it when there were policies in existence when the reinsurance was effected. Even if it would include a subsequent or substituted policy, that could only be the case where the liability is unaltered, otherwise the words, "subject to the same terms, conditions, and clauses as original policy . . . . and to pay as may be paid thereon," would have no effect.

The contention on behalf of the defendant would lead to the inclusion in the reinsurance of risks under a set of clauses different from those in the policies existing at the time of the reinsurance, and there would be no limitation as to future policies. For instance, if there were limitation as to coasting

(1) [1898] 1 Q. B. 739.

trade, a substituted policy might include Atlantic trade. In this case there are several variations, one of which is in the valuation of hull and machinery. This is material, because it might affect the extent of the liability of the reinsurer in case of a total constructive loss where the repairs came to over 5000*l.*, but to less than 5600*l.*

Joseph Walton, Q.C., and *Scrutton*, for the defendant. The omission to fill up the blank is significant of an intention to treat any policy existing or future as an original policy, provided that it complied with the conditions of reinsurance. One of the two policies was about to expire when the reinsurance was effected, and that is sufficient to account for the original policies not being named. The word "original" is used to distinguish between the policy then being effected and the policy or policies under which the assured takes a risk. What the assured insures is his interest as it was then, or might be during the currency of the reinsurance policy. A person may make a valid insurance though at that time he has no interest in the subject-matter, and he can recover provided that he has such an interest at the time of the loss: Arnould on Marine Insurance, 6th ed. pp. 58, 59. Even if his interest is completely changed, if he has some interest he can recover: Phillips on Insurance, 3rd ed. s. 394. Under the substituted policy the defendant was liable as underwriter at the date of the loss, and had an interest covered by the reinsurance policy. He kept up his interest by making the new contract when one of the first policies came to an end; and in doing this he did not alter the liability of his insurers, for, whether in the case of a total loss or otherwise, the valuation in the reinsurance policy is the only one to be looked at.

Carver, Q.C., in reply.

Cur. adv. vult.

Nov. 26. A. L. SMITH L.J. read the following judgment:— The point raised in this case is, What risk has an underwriting company covered under a policy of marine reinsurance dated November 27, 1896?

This depends upon what is the true reading of an unfilled-up

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

A. L. Smith L.J.

clause attached, by means of a rubber stamp, to the margin of a policy upon ship against perils of the sea. Although the action is brought by the company to recover back money paid, under a mistake of fact, it will be convenient to treat the case as if it were an action by Mr. Sedgwick, the reinsured, to recover from his reinsurers a loss under a policy of reinsurance, for it is not disputed that the effect of the rubber clause attached to the policy is to cut down the policy upon ship to a policy of reinsurance.

The question is whether a policy dated February 20, 1897, which I shall call "the new policy," and which was effected after the reinsurance policy of November 27, 1896, is covered by that policy. Prior to November 27, 1896, Mr. Sedgwick and others had underwritten two time policies upon the ship *Collynie*. The first is dated February 20, 1896, and covers the ship against sea perils from February 20, 1896, to February 20, 1897, to the amount of 350*l*. The hull and machinery is therein valued at 5600*l*.—hull at 3600*l*. and the machinery at 2000*l*.—and time clauses are inserted in this policy.

The second policy is dated June 20, 1896, by which Mr. Sedgwick and others underwrote a further risk upon the same ship against sea perils, covering her from June 20, 1896, to June 20, 1897, to the amount of 850*l*. This policy, with the exception of the time covered and the amount underwritten, is identical with the policy of February 20, 1896. The hull and machinery are again valued at 5600*l*.—hull at 3600*l*. and the machinery at 2000*l*.—and similar time clauses are inserted.

Whilst these two policies were running, Mr. Sedgwick, being under liability as underwriter thereon, caused the reinsurance policy now in question to be effected with the company.

By this policy (November 27, 1896) the company, by way of reinsuring Mr. Sedgwick, covered the ship *Collynie* against perils of the sea from November 4, 1896, to June 20, 1897, to the amount of 250*l*., the hull and machinery being together valued at 5600*l*. Affixed upon this policy by a rubber stamp is the following clause, which is called for brevity "the rubber clause": "Being a reinsurance of policy or policies" (here a blank space is left unfilled in) "and subject to the same terms,

conditions, and clauses as original policy or policies, whether reinsurance or otherwise, and to pay as may be paid thereon."

The effect of this clause I have before stated. It converts a policy upon ship into a policy of reinsurance; but what upon its true construction are the interests—or, as I prefer to call them, the liabilities—of Mr. Sedgwick which this rubber clause covers? Is the true reading that the company reinsured Mr. Sedgwick only against loss which might accrue to him under the two original policies then existing which he had theretofore underwritten as the company contend, or is it that the company also reinsured any loss Mr. Sedgwick might incur under policy or policies which he might thereafter underwrite upon the ship *Collynie*, always assuming such loss to occur during the continuance of the reinsurance policy, which is what Mr. Sedgwick contends for?

The ship *Collynie* was lost upon May 3, 1897, which was after the first policy underwritten by Mr. Sedgwick had expired, and after the second policy had been cancelled, which took place upon February 20, 1897, but during the continuance of the reinsurance policy.

Upon February 20, 1897, which it will be seen was about three months after the defendant had underwritten the policy of reinsurance (November 27, 1896), Mr. Sedgwick underwrote a new risk upon the *Collynie* to cover her from February 20, 1897, to February 20, 1898.

In this new policy of February 20, 1897, the hull and machinery of the *Collynie* are valued at 5000*l.*, and not 5600*l.* This, in my opinion for reasons hereafter given, plays an important part in this case.

Mr. Sedgwick's case is that this new policy of February 20, 1897, effected after the making of the reinsurance policy, is covered by the rubber clause, and my brother Kennedy has so held.

It is argued by the learned counsel for Mr. Sedgwick that as by marine insurance law a policy upon ship or goods covers the interest of an assured which exists at the date of loss, and not necessarily at the date of the policy—that as the interest of an assured under a marine policy may vary between the

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

A. L. Smith L.J.

time the policy is effected and the date of loss—the rubber clause by law is capable of covering the new risk Mr. Sedgwick undertook under the new policy of February 20, 1897, for at the date of the loss of the ship Mr. Sedgwick was liable as underwriter thereunder, and consequently had an interest covered by the reinsurance policy.

These propositions of law are not denied by the learned counsel for the company; but they insist, and I think rightly, that the question still remains, what under the reinsurance policy were the interests—or, as I call them, the liabilities—of Mr. Sedgwick which were covered.

It is said for Mr. Sedgwick that the company might have inserted in the space left blank in the rubber clause the numbers of the two then existing original policies, and have limited the reinsurance to such policies, but, not having done so, the company have reinsured any liability Mr. Sedgwick might undertake by underwriting any policy or policies upon the ship *Collynie* subsequent to the reinsurance being effected, if the loss then insured against occurred during the time the reinsurance was running. I do not agree with this.

At the date of the reinsurance policy two original policies, and two only, were in existence upon which Mr. Sedgwick was liable as underwriter. I agree that a person who effects a reinsurance primâ facie reinsures the liability he is under when he effects the reinsurance, and not a liability he is not then under, and may never thereafter come under. To cover this latter liability I should expect to find some words shewing that this latter liability was covered.

Do I find such words in the rubber clause upon the reinsurance policy? By it the company reinsures policy or policies subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon. It seems to me that the original policy or policies here mentioned are the two original policies then in existence. Then what are the policy or policies subject to the same terms and conditions as the original policy or policies? They may include a policy or policies effected after the original policy and policies, and I am not prepared to say that the words are not sufficient to embrace

a policy or policies effected after the date of the reinsurance policy; but it is unnecessary to decide this, for I am clear that to come within the rubber clause the policy or policies to be thereafter effected must contain the same terms, conditions, and clauses as the original policy or policies. Does, then, the new policy of February 20, 1897, fulfil these conditions? Does it contain the same terms, conditions, and clauses as the original policy or policies? My brother Kennedy saw the point about the difference of values in the original policies and reinsurance policy and the new policy, but he said that this was immaterial, because the ship *Collynie* was a total loss, and the difference in value did not matter in this case; but I think this point cannot be thus evaded, and must be dealt with in order to see whether the new policy of February 20, 1897, comes within the rubber clause, and the question is not to be determined upon whether the ship happens to be a total loss or not.

The new policy of February 20, 1897, is upon hull and machinery valued at 5000*l.*, and is not 5600*l.* valued separately as in the original policy or policies. Does this make a material difference between the terms, conditions, and clauses of the original policies and the new policy? I think it certainly does, and to bring out the difference I will take a concrete case. In every case of damage happening to the *Collynie* for which Mr. Sedgwick was liable under the new policy of February 20, 1897, excepting in the case of a total loss of ship, an important factor in ascertaining what was Mr. Sedgwick's liability thereunder would be the agreed value of the hull and machinery, i.e., 5000*l.* Take the case of the question being as to whether the ship was a constructive total loss or not under the new policy. Take cost of repairs as being 5250*l.*—the agreed value is 5000*l.* Mr. Sedgwick would have to pay under the new policy as for a total loss, because the cost of repairs would exceed the agreed value. When he came upon his reinsurance policy the ship would not be a constructive total loss, for the agreed value of the ship being 5600*l.*, it would exceed the cost of repairs, i.e., 5250*l.*, by 350*l.* What then—Mr. Sedgwick would have as underwriter to pay his assured under the new policy of February 20, 1897, as for a total loss, and could only recover

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

A. L. Smith L.J.

an average loss from his reinsurers. It was stated and admitted by Mr. Sedgwick's counsel that 5600*l.* was to be taken as the agreed value of the hull and machinery between Mr. Sedgwick and the company under the policy of reinsurance.

Now, by the rubber clause the reinsurers have agreed with Mr. Sedgwick "to pay as may be paid thereon"—that is, as he pays under the policies he has underwritten, they will pay him up to the amount of 250*l.* underwritten by them, which to my mind shews that the rubber clause deals, as it says, with policy or policies containing the same terms, conditions, and clauses as in the two original policies, and not with policies which do not; and this is the position of the new policy of February 20, 1897.

In my judgment, upon this ground the new policy of February 20, 1897, is not covered by the rubber clause, and Mr. Sedgwick therefore cannot claim from the company as reinsurers losses he may have had to pay as underwriter thereunder.

For these reasons I cannot agree with my brother Kennedy, and I think judgment should be for the company.

RIGBY L.J. read the following judgment:—I am of the same opinion. At the date of the policy of reinsurance the construction of which has to be dealt with in this case, there were in existence two policies, which must in my opinion be deemed to be original policies referred to in the rubber clause. The risk on these policies was covered by the reinsurance policy so long as the policies themselves were running. They, however, came to an end before the loss of the ship, and the only policy in existence at the date of the loss was expressed in terms different in material respects from those original policies. In particular, the valuation of the ship and machinery at 5000*l.*, instead of 3600*l.* on hull and 2000*l.* on machinery as in the policies in existence at the date of the reinsurance policy, brought about such a difference in the risk thereunder as to make it impossible that a reinsurance thereon should be on the same terms, conditions, and clauses as the original policies. In my judgment, therefore, on the facts of this case the rein-

surance policy does not extend to cover the risk under the newly effected policy. In other words, the insured could not recover anything on the reinsurance. I think it unnecessary to determine what would have been the case if there had been no policy underwritten by the reinsured at the time of the reinsurance, or if the new policy had been on the same terms as the policies that were then in existence.

COLLINS L.J. read the following judgment:—The real point in this case turns on the construction of the rubber clause in the policy of reinsurance. Is it framed to cover any risks upon the vessel which the assured may underwrite during the period named, or is it limited to specific ascertained risks? Is it in fact, what it purports primâ facie to be, a reinsurance of an actual existing risk covered by an original policy or policies; or is it an antecedent undertaking to indemnify the assured against any future undefined risks which he may undertake on the named vessel within the given period? If the latter is the true construction, the judgment appealed from is right; if not, it is wrong.

I think the decision of this question stands quite outside the consideration of insurable interest so much pressed upon us in the brilliant argument for the respondent. No question of insurable interest arises in this case; and if it did, it is elementary law that its existence is material only at the time of the loss. It is not material, therefore, to contend that it would be legally possible to make an antecedent contract with an underwriter whereby he should undertake to hold the assured indemnified on all liabilities which he should come under in respect of risks to be undertaken by him within a given period. But it is obvious that the indefiniteness of the risks would be an important factor in determining the amount of the premium. The question here is whether, looking at the plain words of the policy, taken in conjunction with the surrounding facts, the subject-matter of the contract was not risks already undertaken by the assured under existing policies capable of being described. It seems to me that this is the fair meaning of the clause. It is described as "being a reinsurance," which in strictness it

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

Collins L.J.

is not if there is no antecedent insurance, and it is only by somewhat straining the plain primâ facie meaning of the words that they can be held to describe an undertaking to indemnify against risks not already underwritten. The clause goes on, "of policy or policies," leaving a blank for their specification. This again, in my opinion, is framed to cover the case of existing risks. It is inapt to cover policies not yet in existence and incapable of specification. Something more than filling in the blank would be required to make the clause grammatically applicable to risks to be undertaken afterwards. The form is not framed to cover such a case. But the concluding words of the clause are, I think, even less adapted to cover future and variable risks. They are: "And subject to the same terms, conditions, and clauses as original policy or policies, whether reinsurance or otherwise, and to pay as may be paid thereon." This, as was pointed out, is the essence of the contract. Its purpose is to cover in whole or in part the risk actually undertaken on "an original" policy. The standard of liability must be ascertained and identical in both cases. I do not mean that the whole sum underwritten must be covered by the reinsurance, neither need the whole risk. For instance, the original policy may cover any loss, total or partial; the reinsurance may be against total only, or partial only; but the conditions under which one or the other can be recovered are to be identical, so that the payment on the reinsurance may be "as paid" on the original. The clause does not provide for, and it seems to me excludes, the possibility of the same facts giving rise to a claim for total loss on the original policy, and for partial only on the reinsurance policy. The valuation, therefore, in the original and the covering policy ought to be the same where both are valued, and a condition of the former is that in case of constructive total loss the valuation in the policy is to be taken as the value of the ship when repaired; otherwise the main provision of the clause will be defeated, and the standard of liability will never be the same under the two policies except in the single case of an actual total loss. In considering, therefore, the clause itself, and looking, as I am entitled to do, at the surrounding facts to ascertain the subject-

matter to which it was applicable, I find that at the date of the policy of reinsurance there were in existence two policies underwritten by the assured on the same ship at the same valuation—namely, 5600*l.*, which is the valuation named in the covering policy; and I hold that it was the risk on these policies only that was intended to be covered by the reinsurance, which in its terms is in my judgment inapplicable to a policy subsequently effected at a different valuation. It is not and cannot be questioned that at the time the reinsurance was effected it was intended to cover the two existing policies, and complete effect could be given to every word in the reinsurance policy had the loss taken place while these policies were running.

But substitute for these policies a policy at a different valuation, and the standard of liability under the new policy and the reinsurance policy is no longer the same, but different. The argument for the respondent, that the rights of the assured on the reinsurance policy will always be measured by reference to the standard of the reinsurance and not of the "original" policy, does not meet the difficulty, as it admits that the standard of liability would not in such a case be identical; but that it should be identical I look upon as the governing intention of the clause. For instance, in this case Mr. Walton had to admit that, having regard to the difference in the valuation in the new policy and the reinsurance policy, coupled with the provision in the time clauses as to "repaired value," that which would be a constructive total loss under the former might be only a partial loss under the latter, and consequently that, though the amount insured in both policies was the same, the amount payable under the first would be different from that recoverable under the second, and thus what I hold to be the plain intention of the "rubber clause" would be defeated.

The inference from identity of valuation in the policies current at the date of the reinsurance, and in the reinsurance itself, is not in my judgment weakened by the fact that in the current policies this valuation was the sum of two named factors. The lump valuation is not inconsistent with the

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

Collins L.J.

detailed valuation of the original policies, and the words of the rubber clause, "to be paid as paid thereon," would, I think, equalize the scale of payment under the original and covering policy. Still less does it affect the argument that policies to be brought under the reinsurance policy must, if due effect is to be given to the rubber clause, be at the same valuation. The valuation at 5600*l.* has a twofold operation: it helps to identify the subject-matter as being the two existing policies at that valuation, and it excludes a subsequent policy at a different valuation from the scope and intention of the clause. Neither do I draw any inference adverse to the underwriter in this case from the fact that the blanks were not filled up. I think this was probably a mere omission in the hurry of business, and has not had the effect of converting a clause framed, in my judgment, to meet specific risks into a general ambulatory undertaking to cover indefinite risks.

The argument for the respondent which was adopted by Kennedy J. was that any policy effected by the assured on the same ship after the reinsurance during the named period might become the "original policy" within the meaning of the clause, and they were bound to say so, as the contract of the reinsurance is to pay "as paid thereon," i.e., on the original. But I think it is quite impossible to make the language of the clause fit such a construction. As I have already pointed out, the two policies existing at the date of the insurance must in the circumstances of this case have been "the originals" at the date of the reinsurance. If so, it must be the terms and conditions of these policies, and no others, that are to govern the contract, and unless money is "paid thereon," i.e. on these policies, none becomes payable under the reinsurance. Whether or not, therefore, the clause was capable of covering risks not theretofore accepted in a case where none had been accepted at the date of the reinsurance, the fact that in this case risks had been accepted under existing policies which were intended to be covered by the reinsurance necessarily, it seems to me, by constituting these policies "the originals," ties the clause to these policies, and limits the obligation of the reinsurer to pay

as paid thereon; and since nothing became due thereon, nothing is payable by the reinsurer. I am of opinion that the appeal must be allowed.

C. A. 1898

LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION v. SEDGWICK.

Appeal allowed.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

A. M.

WEIR & CO. *v.* GIRVIN & CO.

1898 *Nov.* 23, 28.

Ship—Charterparty—Advance Freight.

By a contract of charterparty the defendants contracted to load on board the plaintiffs' ship a full and complete cargo at a certain rate of freight per ton "on the quantity to be delivered to the consignees." "The freight to be due and paid as follows: Two-thirds in cash three days after sailing ship lost or not lost, the balance on unloading and right delivery of the cargo." After the defendants had loaded a part of the cargo a fire broke out on board and destroyed the goods so loaded. Fire was one of the perils mutually excepted by the charterparty. The defendants subsequently loaded the balance of the cargo, and the ship sailed. Three days after sailing the plaintiffs claimed payment of advance freight on two-thirds of the full cargo shipped:—

Held, that the plaintiffs were not entitled to payment of advance freight on the part of the cargo destroyed.

TRIAL before Lord Russell of Killowen C.J. without a jury.

By a charterparty dated March 31, 1898, made between the plaintiffs, owners of the ship *Olivebank*, and the defendants, as London agents of Messrs. Girvin & Eyre of San Francisco, the charterers, it was agreed that the charterers should load at Hull and on the Tyne a full and complete cargo of any kind of lawful merchandise (except certain specified kinds), and that the ship should proceed therewith to San Francisco. "Freight for the said cargo to be paid on final discharge at the rate of 16*s*." (or 14*s*. in the case of cargo shipped at Hull) "per ton of 2240 lbs. on the quantity to be delivered to the consignees." "The freight to be due and paid as follows: Two-thirds in cash less 6 per cent. for all charges three days after sailing from Tyne ship lost or not lost, and the balance on unloading and

1898

WEIR & Co. v. GIRVIN & Co.

right delivery of the cargo." The peril of fire was amongst others mutually excepted. And it was further provided by a clause in the margin of the charterparty that, "In event of charterers not loading vessel to her marks it is agreed that freight shall be paid on the basis of 4350 tons which owners hereby guarantee to be vessel's capacity of cargo for this voyage." The charterers loaded 1017 tons of cargo on board the ship at Hull. She then proceeded to the Tyne, where they loaded 461 tons more, when a fire broke out on board the ship with the result that of the 1478 tons so loaded part was destroyed, and the rest was so damaged that it had to be removed from the ship. The charterers subsequently loaded on board 2590 tons more, which, with the 1478 tons previously shipped, being of a bulky character, would have exhausted the carrying space of the ship, but would not have loaded her to her marks. The ship sailed for San Francisco. Three days after sailing the plaintiffs demanded payment of advance freight calculated on the basis of two-thirds of 4350 tons, being the total quantity that under the charterparty ought to have been shipped. The defendants refused to pay advance freight on the 1478 tons which were destroyed or removed from the ship. Although they only contracted as agents for the charterers, they consented to litigate the question, and accepted responsibility in the event of the question being decided against the charterers.

Carver, Q.C., and *J. A. Hamilton*, for the plaintiffs. The charterers having failed to load the vessel to her marks, they are by the express terms of the marginal clause liable to pay freight on the basis of the 4350 tons; they must, therefore, pay advance freight on two-thirds of that amount. Secondly, independently of that clause, they are liable to pay two-thirds freight in advance on all goods shipped. The clause that the freight should be paid "on final discharge . . . . on the quantity to be delivered to the consignees" is in print, and is overridden by the later clause that it should be paid "two-thirds in cash three days after sailing, and the balance on unloading and right delivery," which later clause is in writing.

Delivery of the goods affects only the liability to pay the balance. The liability to pay the two-thirds attached on the loading of the goods. The provision that advance freight was to be paid "ship lost or not lost" makes it clear that the payment was not conditional on the probability of safe arrival. And it could make no difference whether the goods were lost at sea or in port.

Joseph Walton, *Q.C.*, and *Scrutton*, for the defendants. Advance freight is only a payment on account of the freight which it is calculated will be ultimately payable, and is not a payment for putting the goods on board: *Allison* v. *Bristol Marine Insurance Co.* (1) Here it was to be due and paid three days after sailing; but before the ship sailed 1478 tons were destroyed or removed from the ship, and it was impossible that any freight could be earned on them. Therefore, that quantity must be deducted in the calculation of the freight ultimately payable. The marginal clause does not render the defendants liable to pay on the 1478 tons. If it were not in the charter-party the defendants would be liable to pay freight on 2590 tons only, being the amount with which the ship sailed. The effect of the insertion of the marginal clause is only to increase that figure to 2872 tons. The original basis on which the freight was to be computed, namely, 4350 tons, has to be corrected in view of what has happened by the deduction of the 1478 tons. The case of *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.* (2) shews that where under a contract to load a full cargo goods have been shipped, and have been destroyed by an excepted peril before the ship sails, the space occupied by the goods destroyed is to be treated as taken out of the charter-party, and the charterer is not bound to load other goods in substitution.

Carver, *Q.C.*, in reply.

Cur. adv. vult.

Nov. 28. LORD RUSSELL of KILLOWEN C.J. In this case during the course of the argument I formed a strong opinion that the plaintiffs were not entitled to recover the money in

(1) (1876) 1 App. Cas. 209. (2) [1894] 1 Q. B. 773.

1898

WEIR & Co. v. GIRVIN & Co.

Lord Russell C.J.

dispute, and to that opinion on consideration I adhere. The plaintiffs, who are the owners of a ship called *The Olivebank*, chartered her in March, 1898, to the defendants as London agents for a firm of Girvin & Eyre of San Francisco. The defendants, although they only contracted as agents, are willing to litigate the only question which I am called upon to decide, and to accept responsibility if that question is decided in the plaintiffs' favour. The question is whether the plaintiffs are entitled to advance freight in respect of 1478 tons loaded on board the charter d ship, but afterwards destroyed by a peril mutually excepted by the charterparty, namely fire. The result of that destruction was that both the charterers, who were bound to supply a full cargo, and the shipowners, who were bound to receive and carry it, had quoad the 1478 tons fulfilled the obligations respectively cast upon them. The charterers were under no obligation to substitute other 1478 tons for that quantity destroyed, nor would the ship have been obliged to receive them even if they had been tendered. It was as though the charterparty had been a charterparty of the carrying capacity of the ship less 1478 tons. Tbe question whether the plaintiffs are entitled to recover advance freight in respect of the part of the cargo so destroyed must depend upon the construction of the charterparty. But, before discussing the terms of that instrument, I should like to say one word about the general character of freight. Freight is a payment to be made to the ship for carriage and delivery, and until there has been carriage and delivery the shipowner is not under ordinary circumstances entitled to demand freight at all. The parties may, of course, make a special agreement if they choose. They may stipulate that the whole freight, or some proportion of it, is to be paid the moment the cargo is put on board, or when the ship sails, or at any other time they please. But they must do so in language shewing clearly that the ordinary obligation of the shipper is altered. To what extent have they done so in the present case? The charterparty provides that the charterers shall load at Hull or on the Tyne a full and complete cargo of any of various kinds of merchandise, and that the ship shall sail therewith to San Francisco. The stipulation as to freight

is, "Freight for the said cargo to be paid on final discharge at the rate of 16*s.* per ton of 2240 lbs." (or 14*s.* in the case of goods shipped at Hull) "on the quantity to be delivered to the consignees." If it stood there it is clear that freight was to be paid on the quantity delivered at San Francisco, and that until that event happened no right to freight would accrue. But the charterparty proceeds, "The freight to be due and paid as follows: Two-thirds in cash less 6 per cent. for all charges three days after sailing from Tyne ship lost or not lost, and the balance on unloading and right delivery of the cargo." The excepted perils, which applied equally to the charterers and to the ship, included the peril of fire. And, lastly, in the margin of the charterparty there appeared this clause: "In event of charterers not loading vessel to her marks, it is agreed that freight shall be paid on the basis of 4350 tons which owners hereby guarantee to be vessel's capacity of cargo for this voyage." The principal object of that clause is to meet the case where the ship although full of merchandise was not, by reason of the light character of the merchandise, loaded to her dead-weight capacity. The evidence shewed that even if the 1478 tons had not been destroyed the total quantity shipped by the charterers would not have loaded the vessel to her marks, although it would have occupied all her carrying space. Under these circumstances, the plaintiffs contended, first, that they are, in any view, entitled to advance freight on the basis of 4350 tons by virtue of the marginal clause. But the answer to that is that, in the events which happened, before they were entitled to any advance at all, the charterparty was disturbed by 1478 tons being struck out of it by causes for which neither party was responsible, with the consequence that the basis of 4350 tons is reduced to 2872 tons. The plaintiffs cannot rely upon that clause for their claim to advance freight on the 1478 tons. But the plaintiffs further contended that, apart from the marginal clause, the stipulations as to the payment of freight shewed that the two-thirds advance freight was to be paid on all goods shipped, and that right delivery was a condition only of a payment of the balance. But, in my opinion, advance freight is only a payment on account of the freight which it is

1898

WEIR & Co. v. GIRVIN & Co.

Lord Russell C.J.

calculated will be payable in the event of the safe arrival of the cargo at the port of destination. And here, at the time when that calculation had to be made, it was known to all parties that, as regarded 1478 tons, the cargo could not possibly arrive, and the ship would never earn a single penny of freight. It is true that, by reason of an express provision to that effect, the calculation of the probable freight was to be displaced in one event, namely, the loss of the vessel. But the fact that the parties have made provision for that one particular event cannot, in my opinion, affect the construction of the clauses as to the liability to pay freight in the event which has happened in the present case—an event which happened before the ship had sailed at all. In my judgment, then, the plaintiffs are not entitled to advance freight upon the 1478 tons which were destroyed.

Judgment accordingly.

Solicitors for plaintiffs: *Cooper & Co.*
Solicitors for defendants: *Hollams & Co.*

J. F. C.

C. A.
1898
Dec. 2.

[IN THE COURT OF APPEAL.]

HALL *v.* COX.

Lottery—Prize Competition—Prediction of Coming Event—Births and Deaths in London during named Week.

The defendant published a newspaper containing an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week. Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer:—

Held, that the competition, not being one the result of which depended entirely on chance, was not a lottery.

APPEAL from a judgment of Lawrance J. at the trial of the cause with a jury.

The plaintiff's claim was for 1000*l.* alleged to be due to him from the defendant under a contract to pay that sum in a certain event. The claim arose out of an offer of a prize to readers of a paper called the *Rocket* who would answer a

question in accordance with certain conditions. The offer was published in the issue of November 13, 1897. The conditions stated that according to the Registrar-General's returns the number of births and the number of deaths in London during the week ending December 12, 1896, were—births (males), 1342; (females), 1213; deaths, 1539. A prize of 1000*l.* was offered for a correct prediction of the numbers of male and female births and the number of deaths in London during the week ending December 11, 1897. A competitor was to fill in a voucher, published in the issue which contained the offer, with the number of births (male and female) and of deaths predicted, in spaces left blank for the purpose, to write name and address and the date in the spaces marked for these particulars, and to send the voucher so filled in, together with a coupon cut from the front page of the *Rocket*, to the office of that paper. Competitors were not limited to one prediction, but each prediction was to be written on a voucher cut from the current issue and sent with a coupon. Consolation prizes were offered under the same conditions for correct predictions or approximations to the number of male births, of female births, or of deaths respectively.

The plaintiff claimed that one of a number of vouchers sent in by him had fulfilled all the conditions for the prize of 1000*l.*, and that the figures filled in were correct according to the return subsequently issued by the Registrar-General. On an application for judgment under Order XIV., the defendant disputed that the plaintiff had sent in a correct voucher, and the case was sent for trial without pleadings. It was tried before Lawrance J. and a jury and a verdict passed for the plaintiff; but, on the defendant raising the point that the competition for the prize was a lottery, the learned judge directed judgment to be entered for the defendant.

The plaintiff appealed. The defendant died before the appeal was heard, and his personal representatives did not take any part in the argument.

Brooke Little, for the plaintiff. The competition in order to be a lottery must come within one or other of the Lottery Acts,

C. A. 1898

HALL v. COX.

as being a distribution of prizes by lot or chance: *Taylor* v. *Smetten* (1); *Barclay* v. *Pearson*. (2). *Caminada* v. *Hulton* (3) and *Stoddart* v. *Sagar* (4) were both cases of selection of winning horses for future races, and bear a close relation to the present case, in which the selection was not a mere matter of chance, but gave opportunities for the exercise of skill and judgment.

The defendant was not represented.

A. L. SMITH L.J. I have arrived at the conclusion that this prize competition is not a lottery. The result, no doubt, depends largely on chance, but not entirely, and the cases shew that to constitute a lottery it must be a matter depending entirely upon chance. There is an element of skill in the inquiry in this case dependent on the investigation of the returns for previous years and the consideration of the increase of population, the death rate, and suchlike statistical investigations. The conditions give the returns for the corresponding week of the previous year, and they are given as a starting-point from which a competitor may estimate, as well as he can, the probable numbers for the week named. It seems to me that the case is similar to *Caminada* v. *Hulton* (3), in which case it was held by Day and Lawrance JJ. that an offer of a prize for naming the winners in races that were to come off was not a lottery, upon the ground, as I understand, that the skilled knowledge of the competitor for the prize was an ingredient in the matter, and this view has been confirmed in *Stoddart* v. *Sagar*. (4) The appeal must be allowed.

RIGBY L.J. I also think this competition was not a lottery on the grounds stated by my Lord.

COLLINS L.J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiff: *H. G. Campion & Co., for A. Muir Wilson, Sheffield.*

(1) (1883) 11 Q. B. D. 207.
(2) [1893] 2 Ch. 154.
(3) (1891) 60 L. J. (M.C.) 116.
(4) [1895] 2 Q. B. 474.

A. M.

THE QUEEN *v.* THE COUNTY COUNCIL OF THE NORTH RIDING OF YORKSHIRE.

1898
Oct. 25;
Nov. 7.

Sea Fisheries—Fisheries Committee—Conditions as to Expenditure—Power of one of several Councils to impose—Sea Fisheries Regulation Act, 1888 (51 & 52 *Vict. c.* 54), *s.* 6, *sub-s.* 1.

Where a local sea fisheries committee contains representatives of more than one county or borough council, it is not open to any one of such councils to make conditions or restrictions as to expenditure under s. 6, sub-s. 1, of the Sea Fisheries Regulation Act, 1888, but the conditions or restrictions referred to in that sub-section can only be imposed by the common agreement of all the councils represented on the committee.

Reg. v. *Mayor of Plymouth*, [1896] 1 Q. B. 158, considered.

Rule nisi for a mandamus to the county council of the North Riding of Yorkshire.

By an Order made by the Board of Trade on July 9, 1890, under the provisions of the Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), "Whereas application has been made to the Board of Trade by the county council of Durham and of the North and East Ridings of Yorkshire, and by the borough councils of Sunderland, Kingston-upon-Hull, and Scarborough, to create a sea fisheries district in accordance with the Act. . . . Now therefore the Board of Trade, by virtue of the powers conferred upon them by the Act and otherwise, do hereby make the following order:—

"A sea fisheries district is hereby created comprising so much of the sea within which Her Majesty's subjects have by international law the exclusive right of fishing, with the adjoining coast, as lies within the following limits [which were then set out in the Order]. . . . The sea fisheries district hereby created shall be called the North Eastern Sea Fisheries District.

"A local fisheries committee shall be constituted for the regulation of the sea fisheries carried on within the said district.

"Such committee shall be a joint committee of the county councils of Durham, of the North Riding of Yorkshire, of the

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

East Riding of Yorkshire, and of the parts of Lindsey in Lincolnshire, and of the borough councils of South Shields, Sunderland, Middlesborough, Kingston-upon-Hull, Scarborough, and Great Grimsby, and shall consist of forty members." The Order went on to provide for the appointment of twenty members by the aforesaid county and borough councils, of whom four were to be appointed by the county council of the North Riding, and for the appointment of twenty members by Boards of Conservators and by the Board of Trade, to represent the fishing interests of the district.

The Order then went on: "The members to be appointed by the councils shall be appointed in each year at the usual quarterly meeting of the said councils respectively held in the month of November. The members to be appointed by the Boards of Conservators and by the Board of Trade shall be appointed in each year before the ninth day of November.

"All the members shall retire and the new members shall come into office in each year on the ninth day of November. . . .

"Except as provided by s. 6 of the Act, no council shall make, vary, or revoke any regulations or standing orders respecting the quorum or proceedings of the committee hereby constituted, or as to the area within which it is to exercise its authority. Provided that any council may make a regulation requiring the committee to submit to such council once in each year an estimate of the expenses proposed to be incurred by them under the Act, and once in each year a printed abstract of their accounts for the preceding year, and to afford to any person or persons appointed for the purpose by the council access at all reasonable times to the books containing these accounts.

"Subject to any restrictions or conditions made under s. 6 of the Act, the committee shall not be required to report its proceedings to any council, nor shall its acts or proceedings be submitted to any council for approval."

By s. 3 of the order the expenses of the committee were made chargeable in proportions of twentieths on the counties and boroughs appointing the representative members, of which four twentieth parts were charged on the administrative county of

the North Riding of Yorkshire exclusive of the borough of Scarborough as special expenses of the council. (1)

On July 10th, 1895, the North Eastern Sea Fisheries Committee appointed a fishery officer at a salary of 150*l.* per annum. At that date no restrictions or conditions in relation to expenditure had been made by the county or borough councils represented on the committee, or any of them.

From the date of the appointment of the fishery officer precepts were issued from time to time by the committee to the various contributory authorities, and such precepts included the salary of the fishery officer and sums for his travelling expenses, and also for expenses incurred for the hire of vessels necessary to enable him to perform his duties. No exception to the payment of such amounts was taken by the county council of the North Riding of Yorkshire, or by any of the contributory authorities.

(1) By the Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 1, sub-s. 1, "The Board of Trade may from time to time, on the application of a county council or borough council, by Order, (*a*) create a sea fisheries district . . . . (*b*) define the limits of the district and the area chargeable with any expenses under this Act, and (*c*) provide for the constitution of a local fisheries committee. . . ."

"(2.) The local fisheries committee for a sea fisheries district shall be a committee of a county council or borough council, or, if two or more councils appear to be interested, a joint committee of those councils. . . .

"(3.) The law relating to committees and joint committees of county councils shall, subject to the provisions of the Order constituting a local fisheries committee, apply to the local fisheries committee in like manner as if the powers and duties of that committee were powers and duties transferred by the Local Government Act, 1888, to the council or councils represented on the committee and delegated to the committee by the said council or councils."

Sect. 6, sub-s. 1: "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of by-laws made by the committee. . . ."

Sect. 10: "The expenses of a local fisheries committee, so far as payable by a county council, shall, according as is provided by the Order providing for the constitution of the local fisheries committee, be general or special expenses within the meaning of the Local Government Act, 1888, and if special expenses shall be charged in manner directed by the Order, and the expenses of the committee, so far as payable by the council of a borough, shall be paid out of the borough rate or borough fund."

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

In 1897 the committee considered the desirability of purchasing a vessel in which the fishery officer could more conveniently perform his duties; and on December 1, 1897, they passed the following resolution:—

"That the vessel sub-committee be empowered to authorize the clerk to communicate with the various contributory authorities, and inquire whether such authorities would be prepared to pay their proportion of the cost of building and maintaining a vessel suitable for the efficient watching of the district from the sea." This resolution was not acted upon, and no communication was addressed to the North Riding County Council as suggested.

On January 19, 1898, the sub-committee appointed to consider the question of purchasing a vessel recommended that precepts be served upon the contributory authorities for raising a sum not exceeding 2500*l.*, the estimated amount required for the building or purchase of a vessel for the use of the fishery officer, and the further sum of 360*l.*, the estimated amount required for one year's working and maintenance of such vessel, the amounts of such precepts to be payable on or before May 1. This resolution was adopted and confirmed by the committee, and precepts were issued on January 22 to the several contributory authorities requiring the payment of their respective proportions of the sum of 2860*l.*, the proportion payable by the county council of the North Riding of Yorkshire being 572*l.* On the precept being brought before the county council they, on March 16, 1898, instructed their representatives on the committee to oppose the purchase of the vessel, and at a meeting of the committee on April 20, 1898, one of the representatives of the North Riding County Council moved, "That the committee take no further action in the matter of providing a vessel for the use of the fishery officer pending efforts being made to obtain from Her Majesty's Government assistance similar to that accorded to Scotland for the purpose of enforcing the Sea Fisheries Regulation Acts." This resolution was lost by a large majority.

On May 11, 1898, the county council of the North Riding

passed the following resolutions, which were duly communicated to the fisheries committee :—

"That pursuant to the resolution adopted by the committee on March 16, 1898, the requisite steps be taken to protect the ratepayers of the Riding from liability in respect of expenditure incurred by the North Eastern Sea Fisheries Committee in disregard of the resolution.

"That the amount of 27,115*l.* 7*s.* (being the total amount of the accounts recommended for payment by the Finance Committee) be reduced by the sum of 572*l.*, being the amount of the precept of the North Eastern Sea Fisheries Committee for the proportion of the cost of a vessel for the use of their fishery officer and of one year's maintenance thereof.

"That in pursuance of the Sea Fisheries Regulation Act, 1888, the county council restrict the expenditure, to which it will be liable, to expenditure the contribution to which payable by the county council shall not exceed 150*l.* in any one year, and that a copy of this resolution be forwarded to the North Eastern Sea Fisheries Committee."

The county council having refused to pay to the committee the said sum of 572*l.*, the committee applied for and obtained this rule nisi for a mandamus calling upon the county council to shew cause why they should not be compelled to pay the said sum.

The county council had never taken advantage of the proviso in the Order permitting any council to require the committee to submit an annual estimate of expenses, and to furnish an abstract of the accounts for the preceding year.

Lawson Walton, Q.C. (*G. A. R. Fitzgerald* with him), for the county council, shewed cause against the rule. The county council had power under s. 6 to make any conditions and restrictions as to expenditure they thought fit, and if the fisheries committee chose to incur this extra expenditure without the consent of the county council, they cannot afterwards charge the county council with a share in the cost. It is plain from the decision in *Reg.* v. *Mayor of Plymouth* (1) that any of the

(1) [1896] 1 Q. B. 158.

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

constituent councils may impose the restrictions or conditions as to expenditure provided by s. 6. The ground of that decision was that in that case the constituent council had not made the restrictions before the appointment of the fishery officer. The extra expenditure involved in the purchase of a vessel in this case was not in contemplation when the fishery officer was appointed. It involves an entirely new policy, and it must therefore be in the power of the county council as soon as it is brought to their notice to refuse to incur this extra expenditure. The proviso in the order that any of the constituent councils may require the committee to submit an estimate of proposed expenses would be altogether useless if the council has no power to impose restrictions on the proposed expenditure.

Asquith, Q.C. (*Blaiklock*, with him), for the fisheries committee, in support of the rule. The only power of a constituent council to interfere with the expenditure of the committee is that given by s. 6. That power cannot be exercised by any one constituent council alone, but the restrictions or conditions must be imposed by the unanimous act of all the constituent councils. Otherwise it would be in the power of each constituent council to throw an unfair and unequal weight on the other councils. Secondly, the word "expenditure" in s. 6 is strictly limited to the expenditure necessitated by the appointment of fishery officers, and does not relate to general expenditure such as was in question here. That is plain from the wording of the section. Thirdly, whatever power there may be of imposing restrictions on expenditure, that power must have been exercised before the appointment of the fishery officer: *Reg.* v. *Mayor of Plymouth.* (1) Here, even if the county council had power by itself to impose the restrictions, it was out of time.

Cur. adv. vult.

Nov. 7. LORD RUSSELL of KILLOWEN C.J. This case comes before us upon the argument of a rule which has been granted by this Court, calling upon the county council of the administrative county of the North Riding of Yorkshire to shew cause

(1) [1896] 1 Q. B. 158.

why a writ of mandamus should not issue directed to them, commanding them to pay to the treasurer of the local fisheries committee for the North Eastern Sea Fisheries District the sum of 572*l.*, being the proportion claimed as payable by that administrative county council, in accordance with s. 3 of the Order for the creation of the North Eastern Sea Fisheries District, of a sum of 2860*l.*, being the amount required by the committee for the purpose of providing a vessel for the use of their fishery officer, and for the cost of one year's working and maintaining of such vessel, demanded by the committee in pursuance of the precept of January 22, 1898. The decision of the question whether the mandamus ought to go depends upon the proper construction of the Order of the Board of Trade creating the sea fisheries committee in question, and the provisions of the Sea Fisheries Regulations Act, 1888, under which that sea fisheries committee was founded. I think it will be convenient first to call attention in general terms to the provisions of the Act; and I do so for the reason that, so far as I am aware, this is the second case in which questions of the nature which I have now to consider have come up for determination in the Courts. Sect. 1 of the Act provides that, "The Board of Trade may from time to time, on the application of a county council or borough council, by Order create a sea fisheries district comprising any part of the sea within which Her Majesty's subjects have by international law the exclusive right of fishing, either with or without any part of the adjoining coast of England and Wales"; and by that Order the limits of the district and the area chargeable with expenses are to be defined. It is also "to provide for the constitution of a local fisheries committee for the regulation of the sea fisheries carried on within the district," and it further provides that the Board of Trade may from time to time on the like application vary the Order so made, as, for example, by uniting two or more districts.

The only observation I desire to make in passing on that section is that it is apparent that, although what is aimed at is the comprehension within one scheme of what may be a considerable area, ruled over by different municipal or local authorities, yet it is not necessary that it should be of that character; the

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Lord Russell C.J.

Order may be made on the application of one county council or of a borough council, and may, although it is not likely that it would, comprise only an area within the jurisdiction of a single body. Sub-s. 2 provides that "the local fisheries committee for a sea fisheries district shall be a committee of a county council or borough council, or, if two or more councils appear to be interested, a joint committee of those councils, with the addition in each case of such members representing the fishing interests of the district, including members representing any Board of Salmon Conservators having jurisdiction within the district, as may be directed by the Order creating the district, such number of fishery members not being in the aggregate less than the number of members of the county or borough councils provided by the Order creating the district. The fishery members shall hold office for the same time as the members appointed by the county or borough council or councils"; so that the composition is a composition of what may be called, in the strict sense of the word, representative members sent by the county councils and the borough councils, and also of members, not so strictly representative in their character, but representing any Board of Salmon Conservators within the district, so far as they may be included by the order made, but with the stipulation that the number of what I for this purpose call non-elective or non-representative members shall not exceed the number of the elective or representative members. Then sub-s. 3 provides that, "The law relating to committees and joint committees of county councils shall, subject to the provisions of the Order constituting a local fisheries committee, apply to the local fisheries committee in like manner as if the powers and duties of that committee were powers and duties transferred by the Local Government Act, 1888, to the council or councils represented on the committee and delegated to the committee by the said council or councils." Then sub-s. 4 provides that every Order made by the Board of Trade shall be laid before Parliament, and if either House within thirty days resolves that either the whole or any part of the Order ought not to be enforced, then it is not to have force, but subject to any such resolution every order so made

shall come into force at the expiration of thirty days. Then there is a provision in sub-s. 5 which shews that this is not a scheme purely voluntary: that in case a county council or borough council to whom application has been made by not less than twenty inhabitant ratepayers refuse to apply to the Board of Trade to create a sea fisheries district, then there may be a further application to the Board of Trade, and the Board of Trade may then proceed to constitute a sea fisheries committee by their Order, as if the application had been made by the council itself; but by sub-s. 6 there is the provision that, before making any Order creating a sea fisheries district, the Board of Trade is to cause the draft of the Order to be circulated, is to hear objections to its provisions, and is to give notice of any inquiry to be held by advertisement and otherwise. Then s. 2 gives power to the sea fisheries committee to make by-laws for the regulation of its fisheries.

Now I come to the two sections which are mainly in discussion and controversy in this case. Sect. 6 says: "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of by-laws made by the committee." So this section, it will be observed, very properly and naturally recognises that the restrictions or conditions as to expenditure shall rest with the contributing bodies. In other words, the members of the fisheries committee, who are sent there as representing Boards of Salmon Conservators, or other bodies of that nature, have no voice in this matter. The conditions and restrictions as to expenditure are to rest with the council or councils, and these restrictions or conditions as to expenditure are, according to the clear wording of the section, to precede the appointment of the fishery officers. Such fishery officers are to be appointed as the fisheries committee think right; but conditions and restrictions may be laid down by the council or councils representing the areas that have to bear the charge, and those conditions and restrictions, if laid down properly and in time, must be observed by the fisheries committee. One

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Lord Russell C.J.

of the important questions, indeed the crucial question, in this case, is when those conditions and restrictions are to be imposed. Sect. 10 provides—this is not unimportant—that "the expenses of a local fisheries committee, so far as payable by a county council, shall, according as is provided by the Order providing for the constitution of the local fisheries committee, be general or special expenses within the meaning of the Local Government Act, 1888, and, if special expenses, shall be charged in manner directed by the Order." Sect. 11 provides that "an Order providing for the constitution of a local fisheries committee may contain such regulations consistent with this Act with respect to the number and mode of appointment of the members of the committee, and with respect to other matters relating to the constitution of the committee, as may seem expedient to the Board of Trade." So it will be seen that while the Act in general terms points out what is to be the mode for obtaining the appointment of a fisheries committee, and gives a general outline as to the constitution of that body and as to its functions, it leaves a great many matters to be filled in by the provisions of the Order of the Board of Trade, which itself is the efficient Act for the constitution of the fisheries committee, and that Order may contain such regulations, always consistent with the Act, in respect of the number and mode of appointment of the members of the committee, and in respect of other matters relating to the constitution of the committee, as may seem expedient to the Board of Trade.

Now application having been made, by what body it is not at all material to inquire, to the Board of Trade, we must assume that all the proper steps were taken by the Board of Trade, and we must also assume—indeed, the contrary was not argued or suggested—that the Order which was on July 9, 1890, made by the Board of Trade, constituting the North Eastern Sea Fisheries Committee was a valid Order, and within the jurisdiction given to the Board of Trade under the Act to which I have referred. But it is necessary that I should call attention in some detail to the provisions of the Order. It recites that application has been made to the Board of Trade

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Lord Russell C.J.

by certain councils—not indeed by all that are subsequently brought within the purview of the Order, but by some of them. It then recites that, in addition to the places represented by the councils, certain other places within the jurisdiction of other local authorities appear to be interested in the proposed district. It then further recites that they had caused a circulation to be made of the draft proposal, and had considered certain objections, and so on, which had been made. Thereupon, by clause 1 of what I may call the enacting part of this Order, the sea fisheries district is created, and its boundaries are set out in detail. On that I need not dwell. Clause 3 deals with the constitution of the committee: "A local fisheries committee shall be constituted for the regulation of the sea fisheries carried on within the said district." Then it provides that such committee shall be a joint committee of the councils of Durham, of the North Riding of Yorkshire (that is, the county council in question), of the East Riding of Yorkshire, and of various other places, including certain borough councils, South Shields, Sunderland, and so on; that it shall consist of forty members, two appointed by the county council of Durham, four by the county council of the North Riding of Yorkshire, four by the county council of the East Riding, and so on, and various other provisions with which I need not deal, relating to the boroughs to which I have referred, making up altogether twenty members, with the addition of twenty members representing the fishing interests of the district, of whom there is to be one from the Board of Conservators of the Tyne Fishery, another from the Wear Fishery, another from the Tees Fishery, and so forth, six in all, and fourteen members appointed by the Board of Trade, making up the forty members altogether. "The members to be appointed by the councils shall be appointed in each year at the usual quarterly meeting of the said councils respectively held in the month of November." That will be found to be not unimportant. "The members to be appointed by the Boards of Salmon Conservators and by the Board of Trade shall be appointed in each year before the 9th day of November." Then comes this provision, which is also important: "All the members shall retire, and the new members shall come into

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Lord Russell C.J.

office in each year on the 9th day of November." I refer to that because it makes intelligible what at first sight did not seem to me so in some of the observations of the then Vaughan Williams J. (now Vaughan Williams L.J.) in the *Plymouth Case* (1), where he spoke of the appointment each year, or the reappointment each year, of the fishery inspector. It would appear from the constitution of this body that, unlike most similar bodies, as to which the usual provision is that a certain proportion of them retire annually—it seems to be the scheme of the constitution of this body that they shall all retire, being capable of re-election, but that they shall all retire at the end of each year. So that there would seem to be, therefore, a moment of time when the fisheries committee did not exist, although its members were capable of being re-elected, or fresh persons might be elected in their place. Therefore, there does seem to have been ground for the language used by Vaughan Williams J. in the *Plymouth Case* (1), in which he spoke of the reappointment annually of the fishery inspector. The Order goes on: "Provided that the first members to be appointed by the councils and by the Boards of Salmon Conservators shall be appointed at the meeting of each body respectively held next after the coming into force of this order." Then comes a very material provision: "Except as provided by s. 6 of the Act"—that is, the section which deals with restrictions which may be laid down as to expenditure by the council or councils—"no council shall make, vary, or revoke any regulations or standing orders respecting the quorum or proceedings of the committee hereby constituted, or as to the area within which it is to exercise its authority: Provided that any council may make a regulation requiring the committee to submit to each council once in each year an estimate of expenses proposed to be incurred by them under the Act, and once in each year a printed abstract of their accounts for the preceding year, and to afford to any person or persons appointed for the purpose by the council access at all reasonable times to the books containing their accounts." Then it proceeds: "Subject to any restrictions or conditions made

(1) [1896] 1 Q. B. 158.

under s. 6 of the Act, the committee"—that is, the fisheries committee—"shall not be required to report its proceedings to any council, nor shall its acts or proceedings be submitted to any council for approval."

Now we come to deal with the only remaining clause to which it is necessary to refer, but which is the one dealing with the mode in which the burthen of expense is distributed. "The expenses of the committee . . . . shall be chargeable as follows:" two-twentieths on Durham, four-twentieths on the North Riding, two twentieths on this authority, one-twentieth on that authority, and so on, till the entire twenty-twentieths are distributed. Now it is important in this connection to observe that it is not possible to increase the burden upon any one of these expense-bearing areas, that is to say, when once the amount of expenses has been determined—it is clear that that is an estimate of expenses, not in fact expenses that have been incurred, but an estimate of expenses for a year to be incurred—when once that figure is determined, then the North Riding can only be charged with four twentieth parts of that amount. I come now to the consideration of that which is the real question in this case, whether, after there has been an estimate of the expenses which the sea fisheries committee have come to the conclusion will be necessarily incurred and must be provided for in the coming year, in order to give effect to the objects of the Act, and to the objects for which the committee was created, it is possible for one of the constituent councils, whether borough or county, to say, "We object to this or that item in that expenditure, and we decline to be responsible to contribute our quota towards that expenditure." Of course, if that contention were well founded, the consequence would be that it would be in the power of any one of these bodies to defeat the whole operation of the Act, because it must be assumed that the estimate of the necessary expenditure was an estimate of what the committee after careful inquiry had decided was necessary to be expended, and, therefore, if one of the bodies upon whom the burden of expense falls is to be able to say that it will not contribute its share, where is the provision by which the defalcation of that council can

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Lord Russell C.J.

be made good? There is none. As I pointed out, the quota of the other expense-bearing authorities or areas cannot be increased.

I have said all that is necessary, both as to the provisions of the Act and as to the Order made under the authority of the Act, and now it is necessary, to bring the matter to the point, to state the facts. The Board of Trade Order was made on July 9, 1890. The committee was appointed, and, presumably, elections have gone on, estimates of expenses have been made, and those expenses have been borne by the several constituent bodies for the several years down to 1896. How far the personnel of the sea fisheries committee has been altered in those years we do not know, nor is it material to inquire. Either the same members were re-elected, or fresh members were elected annually in their place. But the fact is that the fishery officer within the words of the 6th section, who is now acting for the sea fisheries committee, was appointed on July 10, 1895, and having since been continued, in 1896 and 1897, in his appointment, must be taken to have been reappointed, if reappointment were necessary, at the beginning of each successive year. There has been no exercise of the power given to the constituent councils to make any restrictions or any conditions as to expenditure; and it certainly does seem to me that upon the mere statement of those facts there is an end to any argument that the council of the North Riding is entitled to escape liability, since the words of the Order are, "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of by-laws made by the committee." Therefore it is clear that the restrictions and conditions are restrictions and conditions that must precede the appointment of such fishery officers, and it is equally clear that the appointment of such fishery officers as the sea fisheries committee deem expedient embraces consequentially such expenses of equipment, whatever direction that equipment may take, as shall enable that officer or those officers to dis-

charge the duties which are entrusted to him or them, and which are cast upon the sea fisheries committee by the statute and by the Order of the Board of Trade.

That would really seem to me quite enough to end the case; but I think it may be well that I should examine the matter a little further. It will follow, if I am right so far, that the North Riding, not having made either singly (if indeed it could do so effectively, which I doubt) or in concert with others, any restrictions or conditions in regard to the estimates for the year in question, is bound to pay its quota as that quota is fixed by the Board of Trade order.

Now, the next thing in order of date is this, that in November of 1897, when the sea fisheries committee was contemplating what they considered an improved scheme for equipping their fishery officer for the discharge of his duty, which scheme would involve the purchase of a vessel, instead of continuing the system of hiring a vessel for the use of that officer, they proposed to consult the constituent councils upon that, and that apparently thereafter they did not do so. It does not seem, so far as the legal rights and obligations of the parties before us are concerned, that that at all matters. On January 19, 1898, the sea fisheries committee resolved, by their sub-committee, that it would be better to buy rather than to go on hiring. They made an estimate of the expenses, and arrived at the conclusion that that would involve, in the purchase of a vessel, 2500*l.*, and for the maintenance of that vessel for one year 360*l.*, making a total of 2860*l.* That was the resolution of the sub-committee, and that resolution or recommendation came before the sea fisheries committee as a collective body, and was passed, I believe, unanimously.

Now, upon that, on January 22, 1898, a precept was issued by the sea fisheries committee to the county council of the North Riding to pay its share, amounting to 572*l.*, of this estimated amount. Up to the issue of the precept, no objection whatever was made as to what the sea fisheries committee were proposing to do or to what they had done. And it is further to be observed that although clause 2 of the Order constituting the committee gives power to any council to make a regulation

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Lord Russell C.J.

requiring the sea fisheries committee to submit to such council an estimate of the year's expenses proposed to be incurred, no such regulation has been made by the North Riding County Council, nor, so far as we know, by any of the constituent councils. It seems to me, therefore, as plain as anything can well be, that this North Riding Council cannot now after the issue of the precept be heard to say, "We object to this expenditure, we think this expenditure is unwise, and we decline to pay our part." To allow such a repudiation at such a stage would be to render the whole scheme contemplated by the Act and by the Order unworkable, and would put it into the power of one council of a borough or a county to defeat the whole object of the Act and Order. Upon the issue of the precept the North Riding Council instructed their representatives to oppose the scheme, and accordingly a motion was made in the month of March in the sea fisheries committee practically for the purpose of endeavouring to undo the work of the sub-committee; but it was rejected by a large majority. At the meeting of the county council of the North Riding held on May 11 this resolution was passed: "That, pursuant to the resolution adopted on March 16, the requisite steps be taken to protect the ratepayers in the Riding from liability in respect of the expenditure incurred by the sea fisheries committee; that the amount being the total amount of the accounts recommended for payment by the finance committee"—that is, the finance committee of the North Riding—"be reduced by 572*l.*, being the amount of the precept of the sea fisheries committee; that, in pursuance of the Sea Fisheries Regulation Act of 1888, the county council restrict the expenditure to which it would be liable to expenditure the contribution of which payable by the county council shall not exceed 150*l.* in any one year." Now, just see, therefore, what they propose. They say, "Although we have not a priori"—that is to say, before the appointment or reappointment of the fishery officer—"laid down any restrictions or conditions as to expenditure, and although we have not even passed any resolution requiring the sea fisheries committee to furnish us with an estimate of the proposed expenditure, yet, the whole thing

having been done and considered by the sea fisheries committee, we now object." They cannot be heard to say so.

I think, therefore, that this case is a very clear case. I quite agree that cases may be put, which are, however, not strictly necessary to be considered by us now, as to which questions of more or less difficulty may arise. Although it is a safe general rule to deal with and decide only the question which is involved in the case, yet it may from the public and important character of this question be well to say a word or two about the possible other questions that may arise. It was argued before us that any one council might lay down restrictions or conditions on expenditure, and that when they were electing their representatives on the committee at the end of each year they might say, "We elect you subject to this restriction or condition, namely, that no expense shall be incurred by the sea fisheries committee which will involve a greater contribution on the part of the county council of the North Riding, than, say, 150*l*.," the figure they themselves mention. Would that be legal? Would that be within their compass? It seems to me not. It seems to me that the time at which the conditions or restrictions on expenditure ought to be framed ought to be certainly before any expense has been incurred by the committee by the appointment of its officers. Therein one is well founded by the express words of the Act itself. But assuming that objection is made before the appointment of the officers, it cannot, I think, be said that the objection of one of the constituent and contributing bodies is enough to create a restriction or condition within the meaning of s. 6. It seems to me that there must be an agreement amongst all the bodies concerned, and that it does not lie within the power of any one of them to say, "This is a restriction which I insist upon being observed in the action of the sea fisheries committee, or else I do not come under a liability under the scheme." To admit of that interpretation of the statute would be enabling one body that took a short-sighted view, it may be, of its own, or the public interests, a body that thought that it was contributing more than it was gaining by the scheme, to defeat the whole scheme, and to prevent the operation of an Act which was intended to proceed upon this

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL

Lord Russell C.J.

just principle, to give effect to what was believed to be a great public object in the preservation and regulation of our fisheries, and at the same time to construct an equitable scheme by which the burthen of carrying out that object should be borne by those who were interested in it. But to allow each one of the constituent, or expense-bearing, or contributing bodies to judge for itself what was the measure of its gain, and what ought to be the measure of its contribution, would, as it seems to me, wholly and entirely defeat the Act of Parliament. I think, therefore, that this mandamus must go.

Perhaps I ought explicitly to add that if the semble to the head-note in the report of the *Plymouth Case* (1) is rightly attributed to Vaughan Williams J., I do not agree with it.

WILLS J. I entirely agree in the judgment of my Lord, and should add nothing were it not for the importance of the case; but as I have written a judgment I think it well to read it. The substantial question in the case is what is the meaning of s. 6, sub-s. 1, of the Fisheries Regulation Act, 1888. The committee, that section says, may appoint such fishery officers as they deem expedient, i.e., as they deem it expedient to appoint, subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed. The English is not very good, and the phraseology is not accurate. No fisheries committee is appointed by a council or by councils. The meaning, however, is clear, and the phrase should be read, "subject to any restrictions or conditions as to expenditure made by the council or councils by whom members of a local fisheries committee are appointed." The fisheries committee, it is obvious from s. 2, is to consist partly of members appointed by the councils which will have to provide the funds, and partly of at least an equal number of members representing Boards of Conservators or other interests who provide no funds. It was, therefore, reasonable to give some control over expenditure to the paymasters. Accordingly, if there be but one council providing the funds, it may impose restrictions as to expenditure. But if there be

(1) [1896] 1 Q. B. 158.

more than one council, can any one council by itself impose restrictions on the expenditure, or on its own contribution? The two phrases come to the same thing; for if the one council can impose restrictions on its own contribution, it thereby must impose a restriction on the total expenditure which is a definite multiple of the contribution of each council. I cannot think that this is the meaning of the section, as it would put it in the power of any one council to cripple or destroy any effective work on the part of the committee. The restrictions must be imposed by the councils—that is, by the common agreement of all the councils. This, I think, is made plainer by the enactment of s. 1, sub-s. 3, which says that "the law relating to committees and joint committees of county councils shall, subject to the provisions of the Order constituting a local fisheries committee, apply to the local fisheries committee in like manner as if the powers and duties of that committee were powers and duties transferred by the Local Government Act, 1888, to the council or councils represented on the committee, and delegated to the committee by the said council or councils."

By s. 81, sub-s. 1, of the Local Government Act, 1888, it is provided that any county council or councils may join in appointing out of their respective bodies a joint committee to whom, by sub-s. 2, any county council taking part in the appointment may delegate any power which such county council might exercise for the purpose for which the committee is appointed; and by sub-s. 4, "subject to the terms of delegation, any such joint committee shall in respect of any matter delegated to it, have the same power in all respects as the councils appointing it, or any of them." Now, it is quite plain that "the terms of delegation" spoken of must necessarily be the same in all the resolutions of delegation, or else the scheme would be unworkable, and in like manner the work of the fisheries committee could not be carried on unless the restrictions or conditions relating to expenditure, if any, were identical in the case of each of the councils imposing them.

Unless, therefore, there be unanimity on the part of the several councils concerned, there can be no operative restrictions under s. 6. In this instance there were none at all by

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

WILLS J.

any of the councils until the resolution of the North Riding Council of May 11, 1898; and as these restrictions were not concurred in by the other councils, they are, in my opinion, inoperative.

It was urged upon us that the provision contained in the Order of the Board of Trade that any council may make a regulation requiring the committee to submit to such council once in each year an estimate of expenditure proposed to be incurred by them under the Act, and once in each year a printed abstract of their accounts for the preceding year, and to afford to any person or persons appointed for the purpose by the council access at all reasonable times to the books containing their accounts, would be fruitless unless the council could, after examining the estimate and accounts, pass an effective resolution to limit the expenditure. But that consequence does not follow. Any reasonable or well-considered objection to the nature or extent of proposed expenditure coming from any of the contributory councils would be sure to meet with careful attention by the committee, and the consideration of estimates and accounts by the several councils would enable them to request their appointed members to represent to the committee the objections entertained.

I am well aware that cases of apparent hardship may be conceived as possible under this legislation; but the answer is that all legislation of this kind is practical, and can rarely so much as aim at completeness or perfection; and I have no doubt that the good sense of the various bodies represented on the committee itself may safely be trusted to enable the important work of the committee to be done with a due regard to the various interests represented and without injurious friction or serious injustice to any one concerned. By the Order of the Board of Trade all the members of the committee go out of office every year, and, therefore, the opportunity occurs once a year of changing the personnel of the committee, and of imposing any restrictions upon expenditure as to which the councils interested may be unanimous. This provision probably is a sufficient safeguard against things going seriously wrong in the matter of expenditure or anything else.

1898

REG. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL.

Wills J.

The view I have taken of the powers of individual councils to control the general expenditure by imposing limitations not concurred in by the rest is undoubtedly at variance with an opinion expressed by the Court in *Reg.* v. *Mayor of Plymouth* (1); but that opinion was not necessary for the decision of the case, and was given apparently without the Court having considered the consequences to which it would lead, and we are certainly not bound by it.

For these reasons, I am of opinion that the rule for a mandamus should be made absolute.

Rule absolute.

Solicitor for fisheries committee: *Hicks, Davis & Hunt.*
Solicitors for county council: *Lowe & Co.*

A. P. P. K.

HOLLIDAY *v.* NATIONAL TELEPHONE COMPANY.

1898
Nov. 11, 29.

Principal and Agent—Independent Contractor—Liability of Principal for Negligence of—Collateral Negligence.

The defendants were lawfully engaged in laying some telephone wires under the pavement of a street. The wires were threaded through tubes, each of which was fitted into the socket of the one next to it. To do the work of connecting these tubes at the joints with lead and solder the defendants employed an independent contractor. In order to execute the work of connection it was necessary to obtain a flare from a benzoline blow-lamp, which flare could not be obtained without the application of heat to the lamp. A servant of the contractor was using for this purpose a lamp which he ought to have known was defective by reason of its safety-valve being out of order. Wishing to heat the lamp quickly to obtain the necessary flare, he negligently dipped it into a pot of molten solder; whereupon, in consequence of the defect in the safety-valve, it exploded and injured the plaintiff who was passing by:—

Held, that the defendants were not liable, on the ground that the negligence of the contractor's servant was collateral to the execution of the work which the contractor was employed by them to do.

APPEAL from the City of London Court.

The action was brought to recover damages for personal injuries. The defendants were engaged in laying down some telephone wires under a street at Clapham called "The

(1) [1896] 1 Q. B. 158.

1898

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

Pavement." For that purpose they had broken up the pavement of the street, and it was admitted that they had obtained the requisite consents of the local authority to their so doing, and were acting lawfully in doing it. They had laid down a number of tubes into which they inserted bundles of telephone wires. The tubes, which were socketed each into the next, were then joined up to one another, and the joints made tight by rings of lead, after which solder was run into the interstice between the cup or socket of one pipe and the end of the pipe fitting into it. The lead or soldering material was melted in an iron pot, which, with the fire underneath it, was on the footpath, and the soldering material was ladled out of this pot and run into the joints. The joints were below the surface of the ground, and it was necessary to get a flare from a benzoline lamp. Whether this was for the purpose of getting light or heat did not appear. To get the vapour necessary to give the flare heat had to be applied to the lamp, and as heated benzoline vapour is highly elastic, and may be explosive if unduly confined, the lamp was furnished with a safety-valve to prevent undue pressure on the interior. The lamp was out of order, and the safety-valve would not work, and it was conceded by the defendants that the workman who was using it, a man named Alfred Highmore, ought to have known this, and that it was an act of negligence on his part to use it in its then condition as he did. Wanting to heat it quickly, he dipped it into the molten metal, when it exploded, and the molten metal flew up and injured the plaintiff who was passing by. So far as this particular section of the work was concerned, the defendants had themselves dug out the trench, laid the pipes, threaded the bundles of cables through them, and filled in afterwards. As a general rule they did nothing themselves but putting in the cables and filling in at the places where the joints were made—these places being necessarily left open till the joints had been completed.

To make the joints they employed one George Highmore. The terms of his employment were contained in a document of which the following is a copy. It was upon an ordinary tradesman's memorandum form with a printed heading, and ran as

follows :—" Memorandum. London, Nov. 24th, 1896. From G. Highmore, Plumber, Zinc Worker, Hot Water Fitter and Sanitary Engineer. Workshop, 2A, Arthur Street, Old Kent Road. Estimates for General Repairs. To "—so far all except the date was printed—the rest was written. It continued: " To — Brown, Esq., Telephone Co. Dear Sir. Re Clapham Road. I will agree to connect up 2" lead casings of cable work. 7 lb. sheet lead, 2' 4" by 10½" or 11", and connect with wiped joints and seam to the satisfaction of the foreman in charge of work for the sum of eleven shillings per connection. (Signed) G. Highmore." On the same piece of paper lower down was a pencil memorandum initialled by the defendants' manager. " Verbal arrangement later, 12*s*. each, taking in bends, for which it was originally intended to charge extra." And on December 5, 1896, the defendants' manager wrote to Highmore: " Dear Sir. Re Lead Cable Jointing. I beg to inform you that your price of 12*s*. per connection, bends included, has been accepted for the connecting with wiped joints and seams the above cable to the satisfaction of the company's representative." The only other evidence as to the position of Highmore was that it appeared that he had at least two men in his employment, and that at the time of the accident he had got employment at some gasworks, and had said to his brother, " You can take this job off me." The course of business was for the defendants to send to George Highmore when they wanted the connecting to be done, and he came or sent a man, a second generally accompanying, and did the work presumably as soon as he could; but there was no agreement that he should come at any specified time. On the occasion in question the brother Alfred Highmore came to do the work, and came alone. The deputy judge, who tried the case without a jury, held that Highmore was the servant of the defendants, and that the defendants were consequently liable for his negligence; and he gave judgment for the plaintiff for an agreed sum of 25*l*.

The defendants appealed.

Mattinson, *Q.C.*, and *Lawless*, for the defendants. There was no evidence on which the judge could find that George Highmore

1898

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

was the servant of the defendants. The only two facts which it was suggested supported that view were—that he could not wholly choose his own time for doing the work, and that the work had to be done to the satisfaction of the defendants' foreman. But neither of those facts is sufficient: *Reedie* v. *London and North Western Ry. Co.* (1); *Hardaker* v. *Idle District Council.* (2) Secondly, the judge seems to have thought that, even if Highmore was an independent contractor, that fact would not under the circumstances relieve the defendants from responsibility. But in that view he was wrong. He thought the case fell within the general principle that a person who employs a contractor to do work in a highway, which work will be dangerous to the public unless precautions are taken, is responsible if the necessary precautions are not taken; and he relied upon the authority of *Penny* v. *Wimbledon Urban Council.* (3) But the case does not fall within that principle.

There is a distinction between a case in which the damage arises out of a failure by the contractor to perform the duty imposed upon the employer which it was sought to delegate to the contractor, and one in which the damage arises from a mere casual act of negligence not ordinarily incident to the work which the contractor was employed to do. If the accident had resulted from the joints of the tubes being badly made, the defendants would have been liable. But the explosion had no necessary connection with the work contracted for. This distinction is maintained in all the cases. In *Dalton* v. *Angus* (4) Lord Blackburn said: "Ever since *Quarman* v. *Burnett* (5) it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by

(1) (1849) 4 Ex. 244.
(2) [1896] 1 Q. B. 335.
(3) [1898] 2 Q. B. 212.
(4) (1881) 6 App. Cas. 740, at p. 829.
(5) (1840) 6 M. & W. 499.

delegating it to a contractor." In *Hardaker* v. *Idle District Council* (1) Rigby L.J. said: "The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'collateral negligence,' meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do." And in the same case (2) Lindley L.J. used language to the same effect.

Lincoln Reed, for the plaintiff. Highmore was the servant of the defendants. The only difference between this and an ordinary contract of service was that he was paid by the job instead of by time. He was nothing more than a jobbing plumber; the lead for the job was supplied by the defendants. He had no greater freedom of action than an ordinary hired servant. Secondly, if Highmore was an independent contractor, that is not enough to relieve the defendants from the duty of seeing that care was taken in carrying out the work. The negligence complained of was directly incidental to the execution of the work. It was necessary that there should be a blow-lamp, and the use of it in the manner in which it was used was an "improper performance of the work which the contractor was employed to do." The work must be looked at as a whole. The whole of the work was dangerous, and the defendants were bound to take precautions to prevent damage arising.

Mattinson, Q.C., in reply.

Nov. 29. The judgment of the Court (Wills and Lawrance JJ.) was delivered by

WILLS J. This is an appeal from the deputy judge of the City of London Court, who tried the case without a jury, and gave judgment for the plaintiff for an agreed sum of 25*l.* under the following circumstances. [The learned judge stated the facts as above set out, and proceeded as follows:—]

It was argued for the plaintiff that George Highmore was in

(1) [1896] 1 Q. B. 335, at p. 352. (2) [1896] 1 Q. B. 335, at p. 340.

1898

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

Wills J.

the service of the defendants, and that the defendants are liable for the negligence of the person who did the work under him or as his representative. We do not propose to discuss the question whether it makes any difference that Alfred Highmore did the work and not George, and assume for the present purpose that the liability is the same as if George Highmore had done the work. But we think that there was no evidence at all of the relation of master and servant between the defendants and George Highmore. They were under no obligation to find any work for him, or to give him any particular job. All that they engaged was that, if they sent for him and he did the soldering to their satisfaction, they would pay him so much per joint made. There is no evidence that they exercised any control at all over the manner in which he should set about or carry out the work, or interfered in any way with what he chose to do. When this joint was being made the foreman was not even on the spot, nor any one connected with the defendants except a labourer left there to fill in the hole when the work was done. The condition that it should be done to the satisfaction of their foreman stands upon precisely the same footing as the common condition in almost every building or engineering contract that the work shall be done to the satisfaction of the persons for whom it is to be done, or of some one in their employment or appointed by them for that purpose; and of course it follows that if the work was badly done, that person would order it to be done over again. The position of George Highmore appears to have been the very common one of a small master plumber, often no doubt working with his own hands, but having a workshop and employing workmen and making his own contracts, where he could get them, for repairs or other work of a plumber or gasfitter, and he was no more the servant of the defendants than the gasfitter who is sent for to stop a leak in a private house.

It was next argued that Alfred Highmore, though not actually a servant of the defendants, was so far under the control of their foreman that they must be liable for the consequences of this accident. [The learned judge proceeded to discuss the evidence, and came to the conclusion that there was nothing in the evidence to support that contention.]

There remains one other question. There are many cases in which a person who employs another to do work for him is not exempted from liability for accidents arising out of such work, because he has employed an independent person and has not retained any control over processes or details, nor even interfered in any way with the work at any stage. If a person orders a thing to be done which when done or as done is an interference with the safety or rights of another who at the time he is injured is in the exercise of his lawful rights, it is no answer to say that the person for whom the offending thing has been done has procured it to be done by virtue of a contract with some one independent of his interference or control—the "independent contractor" of the books. A man has a hole dug for him, into which a person lawfully passing near or over the spot falls without fault of his own and is injured; a man has a piece of pavement laid down for him in a public highway and leaves part of it projecting so that a passer-by, though exercising due care, trips against it and is injured by the fall; a man has works constructed for him, not unlawful in themselves, but which when done, by reason of their being badly or carelessly done, narrow an ancient highway or infringe the provisions of an Act of Parliament which says that a certain space must be left between the ground and the under side of a bridge, and in consequence an accident occurs causing injury to another;—in all these cases the person ordering the work to be done is liable. He has interfered with the status quo, having no right as against his neighbour to do so, and his neighbour has suffered injury in consequence. So if a man puts up a sign projecting over a highway, and it falls by reason of imperfect construction and some one is injured. The person to whom the thing which does the mischief belongs, or who has caused it to be put, or who has maintained it, where it does the mischief, is liable, no matter whom he has employed to do it. The principle which underlies all these illustrations is that the person for whom the work has been done has failed to see to the doing of something which it was his duty to do, either by himself or by some one for him. The man who disturbs, or who fails to create, a state of things which other people have a

1898

HOLLIDAY v. NATIONAL TELEPHONE COMPANY.

Wills J.

legal right to expect at his hands, is liable for such disturbance or failure. The man who maintains an insecure weight hanging over the heads of passers-by fails in taking care that it shall not expose them to danger. The man who contracts a right of way, vertically or laterally, which the public have a right to enjoy in all its old height or width, and the man who digs a hole in a place where others have a right to expect no hole, disturbs a state of things to which they have a legal right, and does it at his peril if an accident happens by reason of what has been done. In the same way, if the hole deprives a neighbouring house of support to which it is entitled, the disturbance of the status quo is at the risk of him who brings it about.

But there is a broad and well-established distinction between such cases and those in which an accident has happened, not because the thing which has been ordered has been done badly and in its bad state interferes with the rights of others, but because some process which may be natural or necessary in the course of effecting the result to be produced, forming as it were a mere incident in the train of operations and leaving no trace upon the completed work, has been carelessly done by the contractor's servant. This is what Lindley L.J. has termed (adopting language previously used) "casual or collateral negligence," and, as he has pointed out, the difficulty lies rather in the application than in the enunciation of the principle: *Hardaker* v. *Idle District Council.* (1) Here, however, there seems to us to be little difficulty. The act of Alfred Highmore in carelessly plunging into molten metal a lamp which he wanted to heat, containing benzoline and having a safety-valve out of order, is about as typical an instance of negligence merely casual, collateral, or incidental, as can well be conceived. It is certainly not less so than the dropping of a brick by the workman employed in building a bridge in *Reedie* v. *London and North Western Ry. Co.* (2)

We were much pressed with a decision of Bruce J. in *Penny* v. *Wimbledon Urban Council* (3), in which he held that an urban council, which had employed a contractor to do work to

(1) [1896] 1 Q. B. 335, at pp. 340, 341. (2) 4 Ex. 244.
(3) [1898] 2 Q. B. 212.

a street, in the way of sewering, &c., was liable for the negligence of the contractor who, in the course of executing the work, had left a heap of excavated soil on the highway unlighted and unprotected, over which the plaintiff stumbled in the dark and was hurt. The ground of the judgment so far as this question is concerned was that there was necessarily danger to the public in the work done unless it was lighted; that the defendants must have known they were ordering to be done what must be dangerous in itself and without precautions taken, and that they were therefore bound to see that precautions were taken. Nothing less like the present case could well be imagined. No human being could anticipate such a piece of folly as that committed by Highmore, and if common care had been used there was no danger to any one in the work ordered by the defendants to be done, nor anything calling for precautions to prevent the molten lead from flying about. In the ordinary course of things there was nothing to make it fly about or to constitute any source of danger to any one. For these reasons we are unable to agree with the deputy judge, and we must allow the appeal.

Appeal allowed.

Solicitors for plaintiff: *Gibbs, White & Strong.*
Solicitor for defendants: *E. L. Gaine.*

J. F. C.

1898
Nov. 5, 24.

[CROWN CASE RESERVED.]

THE QUEEN *v.* ELLIS.

Criminal Law — Jurisdiction — False Pretences — False Pretences made in Scotland — Goods obtained in England — Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *sub-s.* 13; *s.* 13, *sub-s.* 1.

The defendant, who carried on business in the county of Durham, obtained goods on credit in that county from a traveller of the prosecutors by means of false representations made by the defendant to the prosecutors in Glasgow, in which place they carried on business.

Held, that the offence was properly triable in the county of Durham.

Per Hawkins, Wills and Bruce JJ., on the ground that the offence consisted in obtaining the goods, and not in making the false pretences whereby they might be obtained, and that therefore an English Court has jurisdiction to try a charge of obtaining goods by false pretences where the goods have been obtained within the jurisdiction of the Court dealing with the charge, although the false representations may have been made beyond the jurisdiction of the English Courts.

Per Wright J., on the ground that, under the circumstances disclosed in the case, the possession of the goods by the defendant might be treated as a possession in the county of Durham under a representation made in Glasgow and continuing in the county of Durham.

Rex v. *Buttery*, cited in 4 B. & A. at p. 179, and *Pearson* v. *McGowran*, (1825) 3 B. & C. 700, discussed.

Case stated by Day J.

The defendant was tried at the Durham Summer Assizes upon an indictment, under 32 & 33 Vict. c. 62, s. 11, sub-s. 13, which charged that he having been adjudged a bankrupt and within four months next before the presentation of a bankruptcy petition against him did, in the county of Durham, unlawfully by false representation obtain certain property from Messrs. Arthur & Co., Limited, of Glasgow, amounting in the whole to 1726*l.* 15*s.* 10*d.* on credit and had not paid for the same. He was also charged in another count, under 32 & 33 Vict. c. 62, s. 13, sub-s. 1, that he, between August 31, 1897, and November 18, 1897, in the county of Durham, in incurring certain debts or liabilities of various sums amounting in all to the sum of 1726*l.* 15*s.* 10*d.* to Messrs. Arthur & Co., Limited, of Glasgow, did unlawfully obtain credit under certain false

pretences, which were set out in the indictment. Both charges referred to the same goods, and the evidence in respect of both was the same.

Thomas Noble, the representative at Newcastle and Gateshead of Messrs. Arthur & Co., Limited, of Glasgow, proved that he opened an account with the defendant, who then carried on business as a draper at Gateshead, in the county of Durham, in July 1896, and from that date until July, 1897, various orders were booked for the defendant and executed; that in July, 1897, he began to be afraid to give the defendant further credit without the instructions of his principals in Glasgow; that he arranged that the defendant should have an interview with his principals for the purpose of informing them as to his financial position, which interview took place on September 1, 1897, at Glasgow; that no representations of any kind were made to him or in his presence; that after the interview of September 1, 1897, he received instructions from his principals to continue to supply the defendant, and the defendant also informed him that the interview had been satisfactory both to his principals and to the defendant; that in consequence of these instructions and the defendant's statement he took samples to the defendant in Gateshead, booked orders there, and transmitted most of the orders to Glasgow to be executed, but that some of the orders were executed at Gateshead and the goods delivered there by his porters; that the goods supplied in pursuance of such orders were the subject of the charges against the defendant.

John Richard Kay, the managing director of Messrs. Arthur & Co., Limited, of Glasgow, proved that he had an interview with the defendant in Glasgow on September 1, 1897; that at that interview the defendant made to him the representations alleged in the charge; that the said interview was the only interview he had with the defendant, and the only representations made to him were made verbally and at that interview; that in consequence of the representations then made he gave instructions to Noble to continue to take orders from the defendant.

Evidence was also given to prove that the representations

1898

REG. v. ELLIS.

were false, and that the defendant knew that they were false; that he presented a bankruptcy petition against himself on December 23, 1897, and was adjudged a bankrupt on the same day.

There was no evidence to shew whether the carriage of the goods sent from Glasgow was paid by Arthur & Co. or by the defendant.

The jury returned a verdict of guilty.

At the close of the case for the prosecution counsel for the defence took the objection that the offence was completed in Glasgow, and no part of the offence was committed in the county of Durham, and there was no jurisdiction.

The only question for the consideration of the Court was whether the defendant could be indicted and tried for the offences aforesaid, or for either of them, in the county of Durham.

E. Shortt, for the defendant. The conviction was bad on both counts. As to the first count, it is true that to a charge of obtaining goods by false pretences it is no answer to say that they were obtained under a contract induced by false pretences; but the fraud or pretence must continue at the time the goods were in fact obtained: *Reg.* v. *Martin*. (1) As to the second count, the credit was clearly obtained from the principals in Glasgow, and the offence was complete in Scotland: on this point the case is within *Reg.* v. *Dawson*. (2) The Debtors Act does not apply to Scotland, and therefore the chain of facts constitutes no crime in that country under this Act.

H. Sutton, for the prosecution. The statute is satisfied if the goods were obtained within the jurisdiction by means of a false pretence wherever made. But the transactions both began and ended at Gateshead, and there is evidence of at any rate a continuing false pretence within the principle enunciated by Bovill C.J. in *Reg.* v. *Martin*. (1) The provisions of 7 Geo. 4, c. 64, s. 12, as to the trial of offences begun in one county and completed in another do not appear to apply to such a case as the present; but the facts shew the commission of an offence

(1) (1867) L. R. 1 C. C. 56. (2) (1888) 16 Cox, 556.

complete within the jurisdiction. [He referred to *Rex* v. *Buttery* (1); *Reg.* v. *Leech* (2); *Reg.* v. *Holmes* (3); *Reg.* v. *Jones*. (4)]

Cur. adv. vult.

Nov. 24. The following written judgment was delivered by

WILLS J. The prisoner was indicted at the Durham Summer Assizes, 1898, under 32 & 33 Vict. c. 62, s. 11, sub-s. 13, for that he, having been adjudged a bankrupt and within four months next before the presentation of a bankruptcy petition against him, did in the county of Durham unlawfully by false representations obtain certain property from Messrs. Arthur & Co., Limited, of Glasgow, amounting in the whole to 1726*l.* 15*s.* 10*d.* on credit and has not paid for the same; and under s. 13, sub-s. 1, of the same Act, for that he between August 31, 1897, and November 18, 1897, in the county of Durham, in incurring certain debts or liabilities of various sums amounting in all to 1726*l.* 15*s.* 10*d.* to Messrs. Arthur & Co., Limited, of Glasgow, did unlawfully obtain credit by certain false pretences, which are set out in the indictment. The evidence touching each charge was the same, and the facts were as follows:—

The prisoner carried on business at Gateshead, in the county of Durham, as a draper. Messrs. Arthur & Co., wholesale drapers at Glasgow, had a traveller named Noble, who in 1896 at Gateshead opened an account with the prisoner. In July, 1897, Noble declined to let the prisoner have further goods on credit unless he satisfied the principals at Glasgow as to his financial position. Therefore, on September 1, 1897, the prisoner saw Kay, the managing director of Arthur & Co., Limited, and made to him a number of representations set out in the indictment as to his financial position which were false to the prisoner's knowledge. This interview took place at Glasgow, and there, as both the learned counsel agree, Kay gave instructions to Noble to continue to supply the goods on credit to the prisoner. In consequence of these instructions

(1) Cited in 4 B. & A. at p. 179.
(2) (1856) 7 Cox, 100.
(3) (1883) 12 Q. B. D. 23.
(4) (1850) 1 Den. 551.

1898

REG. v. ELLIS.

Wills J.

Noble continued to call upon the prisoner at Gateshead and there booked orders. Some of the goods so ordered were sent from Glasgow, and in respect of these there was no evidence whether the Glasgow house or the prisoner paid the carriage. Some of the orders, however, were executed by Noble himself at Gateshead, and were delivered by his porters to the prisoner there. The proof of bankruptcy and of the necessary dates was complete, and the only question is whether any offence was proved which the assize court sitting in and for the county of Durham had jurisdiction to try.

There is no real difference material to the present case between the two counts: one speaks of obtaining property *by* false representations, and the other of obtaining credit *under* false representations. In each case the indictment follows the language of the Act of Parliament, but there does not seem to me to be any difference of substance created by the use of the different prepositions. There is no doubt, then, that the false representations were made in Glasgow out of the jurisdiction of the English Courts, and that by or under these false representations goods were obtained in the one case and credit was obtained in the other in the county of Durham; and the question is neatly raised whether, when the false representations are made beyond the jurisdiction of the English Courts and the goods are obtained within the jurisdiction of an English Court dealing with the charge, that Court has jurisdiction to try the case. There can be no doubt that the making of the false representations is an element in the crime, and without it there would be no crime; and if it is essential that all the elements of the offence should take place within the jurisdiction of the English Courts, the conviction could not be sustained.

The precise question now raised is new. It has not in fact occurred with respect to false representations made outside England, whether abroad or in other parts of the British Islands. In England itself the question of jurisdiction as between two counties, where the false representations were made in one county and the goods obtained in another, has not been capable of being raised since 1826; for by 7 Geo. 4, c. 64, s. 12, it was provided that where any felony or mis-

demeanour shall be begun in one county and completed in another, it may be dealt with in any of the said counties in the same manner as if it had been actually and wholly committed therein. Three observations here arise: first, that the particular state of circumstances which gives rise to the present question is not of so frequent occurrence as to make it surprising that the question has not been raised for decision; secondly, that any authority bearing upon the analogous case of the offence in question being committed by false representations being made in one county and goods being obtained by and supplied under them in another county must be looked for before 1827; and, thirdly, that it is within the undoubted competency of the British Legislature to enact that the obtaining of goods in England by means of false pretences made whether in or out of England shall be an offence against British law.

In this—as in most other cases—there is room for a good deal of argument on either side of the question, and it would not be uninteresting certainly to embark afresh upon some of the investigations which formed the subject of so much of the discussion in *Rex* v. *Burdett*. (1) But if there is distinct authority sufficiently germane to render such a task superfluous, it is, as it seems to me, equally unnecessary and inadvisable to resort to it. In my opinion there is such authority, and I will proceed to state what it is.

Some time before the year 1820, one Buttery was indicted and tried in Herefordshire for obtaining goods by false pretences; the false pretences were made in Herefordshire, and the goods supplied in Monmouthshire. The prisoner was convicted, and a case reserved, according to the practice of those days, for the consideration of the judges at Serjeant's Inn. The case is not reported; but in *Rex* v. *Burdett* (2) Abbott C.J., after stating the facts, comments upon it in these terms: "The language of the statute (30 Geo. 2, c. 24, s. 1) makes the offence to consist in obtaining the money and not in using any false pretence whereby money shall be obtained. The judges thought the indictment was laid in the wrong county. They did not think the party not indictable at all, which they ought to have

(1) (1820) 3 B. & A. 717; 4 B. & A. 95. (2) 4 B. & A. at p. 179.

1898

REG. v. ELLIS.

WILLS J.

done, if the proposition addressed to us be true." I will state a little later what that proposition was. The Lord Chief Justice continues: "They did not think the party not indictable at all because the pretence which was necessary to constitute the crime was in one county and the receipt in another, and so there was no entire crime in either." The argument in *Rex* v. *Burdett* (1), to which these observations were addressed by the Lord Chief Justice, was that a libel written in one county for publication, but published in another county, constitutes no offence triable in either, because there is in neither any one entire crime. The majority of the Court, consisting of Abbott C.J., Holroyd and Best JJ., held, dissentiente Bayley J., that the offence was triable in either county. The case of *Rex* v. *Buttery* (2) is cited only in the judgment of the Lord Chief Justice. It was not exactly in point, and all that can be said of it in connection with *Rex* v. *Burdett* (1) is that it is cited by Abbott C.J. without any expression of disapproval.

But in 1825 the case of *Pearson* v. *McGowran* (3) was before the same Court of King's Bench, and it seems not only to adopt and confirm the decision in *Rex* v. *Buttery* (2), but to base it upon a ground which entirely covers the present case. *Pearson* v. *McGowran* (3) was an action for penalties under a statute which enacted that "every person who shall upon any contract take accept and receive by way or means of any corrupt bargain above 5 per cent. shall forfeit" a given sum, half of which was to go to the person who should sue for the penalty. The contract was made in Middlesex. The money paid in pursuance of the contract was paid in London. Upon a rule to set aside a verdict for the plaintiff and enter a non-suit, pursuant to leave reserved, it was argued for the plaintiff that the offence was a misdemeanour, and was committed partly in one county and partly in another, and therefore triable—according to the decision in *Rex* v. *Burdett* (1)—in either. The Court held the contrary, and ordered a nonsuit to be entered. The considered judgment of the Court, which at that time consisted of Abbott C.J., Bayley (the dissenting judge in *Rex* v. *Burdett* (1))

(1) 3 B. & A. 717; 4 B. & A. 95. (2) Cited in 4 B. & A. at p. 179.
(3) 3 B. & C. 700.

and Littledale JJ., was delivered by Abbott C.J., who said: "We think it (the offence) consists in the taking and receipt of usurious interest. The corrupt contract is antecedent to, and not a part of, the taking. The offence therefore was not committed partly in one county and partly in another, although the contract is undoubtedly a material circumstance in the case, because it stamps the illegality of the receipt. This resembles *Rex* v. *Buttery* (1), which was an indictment on the statute 30 Geo. 2, c. 24, for obtaining money by false pretences. That statute enacts that 'all persons who knowingly and designedly by false pretences shall obtain from any person money, goods, &c., with intent to cheat or defraud any person of the same shall be deemed offenders against law.' The language of the statute makes the offence to consist in obtaining the money, and not in using any false pretence whereby money shall be obtained. The indictment was in Herefordshire, the false pretence was in Herefordshire, but the money was obtained in Monmouthshire. The judges thought the indictment was laid in the wrong county. That comes nearer to the present case than any of those cited at the bar or found by us. *Upon that authority*, therefore, *and upon* the language of the statute, we are of opinion that the rule for entering a nonsuit must be made absolute."

Mutatis mutandis, every part of the passage cited from each of the judgments is applicable to the present case. The making of the false pretences is antecedent to, and not a part of, the obtaining the goods. It is a material circumstance, because it stamps the illegality of the obtaining the goods. The gist and kernel of the offence is the obtaining the goods by improper means, not in using the improper means whereby goods were obtained, and there was therefore an entire offence within the one county, though the circumstance which stamped it with illegality took place beyond the jurisdiction. If the *principle* of the decision in *Rex* v. *Buttery* (1) and in *Pearson* v. *McGowran* (2) be correct, it can make no difference that the material circumstance which stamped an otherwise innocent transaction with the character of a crime took place outside the

(1) Cited in 4 B. & A. at p. 179. (2) 3 B. & C. 700.

1898

REG. v. ELLIS.

WILLS J.

jurisdiction of the English Courts. It was just as much outside the jurisdiction of the Court which tried the offence in *Rex* v. *Buttery* (1) and *Pearson* v. *McGowran* (2) as if it took place in Scotland or abroad. It is, in fact, by those decisions reduced to a mere piece of the evidence necessary to constitute the offence.

There is nothing unreasonable in this view. There is no moral difference between an offence where the representations are made in England and one where they are made in Scotland. There has been no expression of judicial opinion anywhere finding fault with *Rex* v. *Buttery* (1) and *Pearson* v. *McGowran*. (2) The views expressed are those of a perhaps exceptionally strong Court, some members of which certainly were exceptionally familiar with questions of pleading and venue, and it seems to me altogether too late to question the authority. The present legislation is subsequent to it, and it is a sound principle that, unless there be some strong countervailing reason, fresh legislation in pari materiâ, and using language identical with or indistinguishable from former Acts which have received judicial construction, should be construed upon the lines of the former decisions.

It has been urged upon us that the fact that the Act of 7 Geo. 4, c. 64, s. 12, contained the provisions which have been set forth by which misdemeanours committed partly in one county and partly in another are triable in either indicates a doubt as to the soundness of the decisions, then recent, of *Rex* v. *Buttery* (1) and *Pearson* v. *McGowran*. (2) I do not think there is anything in this argument. The provision in question covers a vastly greater area than those two cases. It is contained in a section which deals with both felonies and misdemeanours. Its provisions were undoubtedly new as to most felonies, at all events. It was most natural that when such provisions were enacted as to felonies they should be so extended as to place misdemeanours upon the same statutory footing in this respect as felonies.

It was further urged for the prisoner that it required a statute (59 & 60 Vict. c. 52) to make the receipt of stolen property, with the guilty knowledge that it had been stolen, an

(1) Cited in 4 B. & A. at p. 179. (2) 3 B. & C. 700.

offence triable in England where the property had been stolen abroad and the receiving had taken place in England. But the cases have no real analogy. The receiver, although guilty by statute of a substantive felony, is in all essential respects an accessory. There can be no receiver unless there has been a thief; and if the larceny, which is the starting-point of the crime, be not established, there is no offence in the receiver. It is, therefore, essential to shew a crime in some one else before you can make any case against the receiver. A crime in English jurisprudence means a crime by English law, and cognizable by an English Court; and if there was no such crime established, the receiver could not be convicted. This seems to me to be the true ground upon which it was rightly decided, in *Reg.* v. *Debruiel* (1), that a receiver in England could not be convicted where the property had been stolen in Guernsey. Byles J. there points out that transactions which may be larceny by English law may not be so by the law of Guernsey; and it would be strange if (without express legislation) that which might not be an offence in the country where it took place should be made the foundation of a crime in England which consists essentially in being an accessory to the principal transaction. This is a good illustration of the inconvenience of holding a receiving to be a crime in England where the principal offence has been committed abroad.

In the case now under consideration no question arises as to the commission of any crime in Scotland, nor as to the application of Scottish law to any part of the case.

For these reasons, I am of opinion that the conviction was good, and ought to be affirmed.

Lord Russell of Killowen C.J. read the following judgment of

HAWKINS J. I agree in thinking that the conviction ought to be affirmed. The crime consists in the obtaining the goods by means of a false representation previously made. The goods must no doubt be so obtained within the jurisdiction of the Court before which the offender is tried; but I find no warrant for saying that it is essential that the false representation

(1) (1861) 11 Cox, 207.

1898

REG. v. ELLIS.

Hawkins J.

should be also made within the jurisdiction. To simply make a false representation with intent thereafter to defraud is not a legal crime; but if goods are obtained by means of it, the so obtaining the goods amounts to an indictable offence, wheresoever the false representation itself may have been made.

A false representation made to a London tradesman out of the jurisdiction, say in Paris, with the object fraudulently to obtain goods from that tradesman in London, must, according to every dictate of good sense, be intended by the maker of it to operate on and continue present in the mind of the tradesman until the goods are actually obtained from him, and by his conduct in obtaining the goods he ought, in my opinion, to be treated as having repeated his representations quite as effectually as if he had again put them in words.

Let me suppose that at the interview in Glasgow the managing director, believing the false representations of the defendant to be true, had said to the defendant, "I am satisfied; I shall be in Gateshead in a day or two, and as you have satisfied me, I will let you have the goods you require"; and in a day or two both had again met in Gateshead, and then, without another word being spoken, the managing director, acting on the Glasgow conversation, had handed to the defendant on credit the goods he required, would it not be revolting to good sense if it could be truly said that the law in this commercial country was such that the defendant could avert the consequences of his crime by alleging that, though he had beyond all question obtained the goods by fraudulently false pretences, he could not be punished, because his false pretences were made in Glasgow?

WRIGHT J. I agree that this conviction must be affirmed. Looking at the two counts in question, and at the provisions of the Debtors Act upon which they are founded, it seems to me that they are at any rate good counts after verdict, for the particular false pretence upon which the goods or credit were obtained need not be stated, it being sufficient after verdict if there is a general averment that they were obtained by false

pretences. The evidence is that the goods were delivered to, and therefore obtained by, the defendant in Gateshead under a representation made by him in Glasgow, and I think that his possession of the goods may be treated as a possession in Gateshead under a representation made in Glasgow and continuing in Gateshead.

I think it better not to determine the larger question whether the principle of *Rex* v. *Buttery* (1) applies to the present case. In that case all the elements were present which were necessary, within the principle laid down by Lord Coke, to bring it within the jurisdiction of the common law, and whether the case was to be tried in one county or another, all the questions of law that might arise would have to be determined in accordance with the law of England. Even so, Bayley J. was not clear upon the point, and a statute was thought necessary to set the question at rest. It is not clear to me that the same principle applies if the false pretences were made in a foreign country, and for the purposes of this case Scotland must be treated as though it were a foreign country. In *Rex* v. *Buttery* (1) the question was one of what has been called defectus triationis, and the ground of the objection and decision was that the grand or the petty jury could not take cognizance of the case if the goods were obtained in another county. In the present case the question raised is one of substance. The offence of obtaining goods by false pretences substantially depends upon the question whether the defendant has obtained by fraud the consent of the owner to a change in the property in the goods; if consent has not been obtained, the offence is larceny; if it has been so obtained, it is a misdemeanour. But where the false pretence has been made in a foreign country, the law of that country as to false pretences may not be the same as it is here. The laws of other countries may, and do, differ as to the facts which would amount to a change of the property in a chattel, as to the persons who can give such consent to the change of property, as to what vitiates the consent, and as to what makes the transaction merely voidable or absolutely void. And further, such questions might determine the nature of the crime,

(1) Cited in 4 B. & A. at p. 179.

1898

REG. v. ELLIS.

Wright J.

whether it amounted to theft or false pretences; for according to whether consent to the change in the property of the goods was or was not given, the offence committed might be a felony or a misdemeanour. I am not therefore prepared to decide the larger question dealt with by my brother Wills; but, for the reasons I have given, I agree that this conviction was right, and should be affirmed.

BRUCE J. I agree that the conviction should be affirmed. I have only one word to add. The rule of common law restraining jurors from inquiring into facts arising beyond the limits of the county was not at any time so strictly observed in misdemeanours as in felonies. It seems to me that in the case of a misdemeanour the offence can be properly dealt with in the county where the offence is completed, notwithstanding that some act constituting a material circumstance may have happened altogether beyond the jurisdiction.

LORD RUSSELL of KILLOWEN C.J. I agree with the conclusion at which the other members of the Court have arrived, that this conviction should be affirmed.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitors for defendant: *Joel & Parsons, Newcastle-on-Tyne.*

W. J. B.

BRITTEN *v.* GREAT NORTHERN RAILWAY COMPANY.

1898
Nov. 28.

Railway—Passengers' Luggage—"Ordinary Luggage"—Bicycle.

A bicycle is not "ordinary luggage," within the meaning of a Railway Act, by which every passenger travelling in a carriage of a certain class may take with him his ordinary luggage, not exceeding a certain weight, free of charge; and therefore a passenger by train, without luggage, is not entitled to take with him, free of charge, a bicycle, not packed up, and of less weight than the weight of luggage allowed to be carried free of charge by the class in which he is travelling.

ACTION tried before Channell J. without a jury.

The plaintiff's claim was for a declaration that on October 23, 1897, the plaintiff, as a passenger by the railway of the defendant company who had duly paid for his ticket as such passenger, was entitled to have the plaintiff's bicycle carried by the defendant company to the plaintiff's destination free of charge as ordinary personal luggage; for damages for the refusal of the defendant company to carry the plaintiff's bicycle free of charge; and for the sum of 6*d.*, being money wrongfully demanded by the defendant company for the carriage of the bicycle, and paid by the plaintiff to the defendant company under protest on October 23, 1897.

The following admissions were made by the parties for the purposes of the action only: That on October 23, 1897, the plaintiff became a second-class passenger on the railway of the defendant company from King's Cross Station to East Finchley Station, and duly paid his fare and received his ticket as such passenger, and thereby became entitled to be carried by the railway of the defendant company from King's Cross Station to his destination. As such passenger the plaintiff was entitled to have his "ordinary luggage," up to and within the weight allowed by the Acts and the by-laws and regulations of the company, carried by the train in which he was travelling free of any charge beyond the charge paid by the plaintiff for his ticket. The sole object of the plaintiff's journey to East Finchley was to enjoy a ride there with a friend, and then

1898

BRITTEN v. GREAT NORTHERN RAILWAY.

return to London, and the plaintiff brought his bicycle with him to King's Cross Station with the object of carrying it with him to East Finchley in the train by which he was to travel. The weight of the bicycle was about 30 lb., which is less than the weight of the ordinary luggage which under the Acts and the by-laws and regulations of the defendant company a passenger by the defendant company's trains is entitled to have carried free of charge. The plaintiff had no other effects with him. It has in recent years, since the introduction of bicycle riding as a recreation and amusement, become a constant practice for persons to travel by train into the country, and for their bicycles to be carried in the same train, with the object of enjoying bicyle rides in the country, and the defendant company and other railway companies now frequently carry very large numbers of such passengers and their bicycles by the same train. The number of bicycle riders has greatly increased in the last two or three years, especially on holidays and in holiday season. The plaintiff, on becoming a passenger by the defendant company's railway on the day aforesaid, requested and claimed to be allowed to take his bicycle with him, and have the same carried in the railway train of the defendant company as part of his personal luggage, free of any charge beyond the charge paid by the plaintiff for his ticket. The defendant company refused to allow the plaintiff to take with him his bicycle, or to carry the bicycle free of charge as part of his ordinary luggage, and demanded the sum of 6*d.* (in addition to the sum paid by the plaintiff for his ticket) as a charge for carrying the bicycle in the train by which the plaintiff was going to travel. The defendant company refused to carry the bicycle unless the plaintiff paid the additional sum of 6*d.* The plaintiff paid the additional sum of 6*d.* under protest. The measurements and weight of an ordinary bicycle are as follows: Length, about 6 ft.; height, 3 ft. 6 in. to 3 ft. 9 in.; width across handle-bar, 18 in. to 21 in.; width across pedals, 12 in. to 15 in.; average weight, 25 lb. to 30 lb. The dimensions of an ordinary express van on the defendants' railway are: Length, 28 ft. 6 in., and 31 ft. 6 in.; breadth, 7 ft. Not more than six bicycles can be placed in the width of a van

so as to enable any one or more of them to be taken in or out during a journey. Thus six bicycles would occupy a space of (6 ft. by 7 ft.) 42 square feet in a luggage van. Bicycles cannot be safely laid down, as (apart from the oil in the lamp) damage would result to the spokes, tires, &c. An ordinary express van, if reserved exclusively for cycles, would not hold more than thirty. In busy times it frequently happens that cycles have to be taken out of the van to allow luggage to be sorted and packed, or the luggage has to be taken out to enable the bicycles to be securely fixed and to be got in and out. Since the year 1895 the number of bicycles carried by railways has enormously increased, charges being made by all the railway companies for the carriage thereof. Bicycles unpacked are all conveyed by passenger trains, mainly by the express trains carrying the greatest amount of passengers' luggage. They require exceptional care, and are exceptionally difficult to deal with. The following difficulties occur in connection with the transit of bicycles by railway: (1.) An exceptional amount of porterage work is involved in moving the vehicles on to or off cabs or other road vehicles, and taking them to the vans; (2.) exceptional care is required, owing to the fact that cycles will not stand alone, but require to be held or to rest against a wall or some other support; (3.) there is a great difficulty in packing the bicycles in the vans with ordinary luggage, and great care is required to prevent them from shifting and rubbing against one another; (4.) an exceptionally large amount of floor space is required in the vans, owing to the length of the bicycles, and the tendency of the pedals and handle-bars to interlock with those of other machines; (5.) great difficulty is experienced in getting at any particular bicycle or bicycles required to be taken out at intermediate stations, and great care is required in getting them in and out, owing to the ease with which the steering wheel turns. These difficulties are greatly increased when there is a large amount of ordinary traffic in a train. The cycles require floor space, and luggage cannot be placed upon them, and if the luggage and bicycles are not amply secured the luggage may shift on the journey and damage the cycles. In many instances there is no

1898

BRITTEN v. GREAT NORTHERN RAILWAY.

room in the ordinary luggage van for cycles, and the latter have had to be placed in third-class compartments specially reserved for the purpose.

The action was tried without pleadings on the above admissions.

Joseph Walton, Q.C., and *Muir Mackenzie*, for the plaintiff. A bicycle is "ordinary luggage," within the meaning of the defendants' Act of Parliament (1), and therefore the plaintiff is entitled to the relief which he claims. "Ordinary luggage" is not limited to clothing and such other articles as are usually carried in a portmanteau or trunk. It would include many other things, such as a walking-stick, an umbrella, skates, golf clubs, a cricket bat, a gun, a fishing-rod, and many other articles of a similar nature: see *Macrow* v. *Great Western Railway* (2); and a bicycle may with equal reason be included. In the judgment already referred to occurs this passage: "The general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." (3) This statement is very much in point in the present case, for it is shewn by the admissions that the practice of bicycle riding, and of carrying bicycles by train, has become very common. The mere fact that a bicycle takes up a great deal of space cannot help the defendants' contention, for the same is the case with regard to a lady's trunk, which is clearly ordinary personal luggage. A bicycle might not have been ordinary luggage when the Act was passed, but the habits and wants of mankind have changed. For instance, in *Clyde Cycle Co.* v. *Hargreaves* (4), it was held that a racing bicycle might be necessary for an infant apprentice. Here the bicycle was

(1) The Great Northern Railway and East Lincolnshire Railway Acts Amendment Act, 1850 (13 & 14 Vict. c. lxi.). By s. 17: "Every passenger travelling upon the said railways in a first class carriage may take with him his ordinary luggage not exceeding 112 lbs. in weight, and every passenger travelling in a second class carriage may take with him his ordinary luggage not exceeding 60 lbs. in weight, and every passenger travelling in a third class carriage may take with him his ordinary luggage not exceeding 40 lbs. in weight, without any charge being made for the carriage."

(2) (1871) L. R. 6 Q. B. 612, at p. 622.

(3) L. R. 6 Q. B. at pp. 620, 621.

(4) (1898) 78 L. T. (N.S.) 296.

carried for the plaintiff's personal use, and with reference to the purpose of his journey, which distinguishes the present case from *Hudston* v. *Midland Railway* (1) and *Macrow* v. *Great Western Railway*. (2) Where a passenger by railway carries a bath with him, surely that may be included among his ordinary luggage. It is for personal use, and so is a bicycle.

C. A. Russell, Q.C., *Montague Lush*, and *G. C. Colville*, for the defendants. The contention for the plaintiff goes too far. If it were correct, it would apply to tricycles, and even to motor cycles, if within the statutory weight, and it might even be made to extend to light racing boats or canoes. It is clear that the size of the article, independently of its weight, may be taken into consideration: *Hudston* v. *Midland Railway*. (1) It may be difficult to give a complete and exhaustive definition of "ordinary luggage," but a bicycle, under the circumstances referred to in the admissions which have been made in the present case, cannot fairly be included in any reasonable definition which can be suggested.

[The following authorities were also referred to: *Great Northern Railway* v. *Shepherd* (3); *Bruty* v. *Grand Trunk Railway Company of Canada* (4); and the cases collected in Angell on Carriers, s. 115, and Story on Bailments, s. 499.]

CHANNELL J. This case is necessarily a novel one; but I am clearly of opinion that a bicycle cannot be considered to be "ordinary luggage," within the meaning of this definition. It is one of the cases in which it is far easier to say what is not luggage than it is to give an exhaustive definition of what is luggage; and the judges have apparently always found that to be the case.

The definitions that have been given have always been given in that shape; they have been given in the way of excluding some article that has been in question in those cases. I think there are certain requirements which must exist in order that the thing may be ordinary luggage; first of all, that it must be for the passenger's personal use; and next, that it must be for

(1) (1869) L. R. 4 Q. B. 366.
(2) L. R. 6 Q. B. 612.
(3) (1852) 8 Ex. 30.
(4) (1871) 32 Canada Q. B. Rep. 66.

1898

BRITTEN v. GREAT NORTHERN RAILWAY.

Channell J.

use in connection with the journey, which, I understand, means that it must be something that is habitually taken by the person when he is travelling, for use, not merely during the actual journey, but for use during the time he is away from home. He is not to take his furniture, and such like articles of permanent use, under the category of luggage. So far that excludes things which are not taken for those purposes, but it does not seem to me at all necessary to say that it includes everything which is taken for personal use. It seems to me that, overriding it all, in the word "luggage" there is involved the idea of a package or something of that sort; and it seems to me that an article which is taken, as it were, loose, as a bicycle is taken, is subject to rather different considerations. I think that Mr. Russell is right in saying that there must be added to the things which are not luggage things of a special character, which require special care, and are not packed in this way. There are many small articles, such as musical instruments, for instance, or a gun apart from its case, which are sometimes carried by passengers. I do not think that a passenger could require articles of that kind to be taken as luggage, loose and without package, though it may be that a gun in a gun case packed up would be a package and ordinary luggage. It has never been apparently decided to be so; but there is the important dictum of Cockburn C.J., in *Macrow* v. *Great Western Railway* (1), to the effect that articles of that character might be. I think, however, that the Chief Justice was referring to articles such as an easel, and a fishing-rod when packed for travelling, and that he did not mean that a railway company could be required to take, as ordinary luggage, a fishing-rod which did not take to pieces, and might exceed the length of the luggage-van. It seems to me there is, in addition to the requirement that they are for some personal use, the requirement that they must be of the kind of things that are usually denominated as luggage. To my mind it conveys the idea that they are carried about in a box or a bag, or something of that kind. That is the popular idea conveyed by the word "luggage." If a package of that kind is lost, and is afterwards

(1) L. R. 6 Q. B. at p. 622.

proved to have contained certain articles not for personal use, then, as was decided in *Macrow* v. *Great Western Railway* (1), in the case of sheets and things of that sort, which were for permanent use in the home, those things may be excluded from the articles which the company were bound to carry, and for which they were responsible. But it seems to me that, in addition, there is the requirement I have referred to, namely, the character of the article. When it is tendered to the company unpacked, it seems to me they are entitled to say, "this sort of thing is not what we are called upon to carry as personal luggage"; and that is, I think, the result of the case of *Macrow* v. *Great Western Railway*. (1) I think that is sufficient to justify me in holding that a bicycle is not personal luggage.

In one sense I do not think that the date of the Act of Parliament is very material, because the habits of people alter; and if people are now in the habit of carrying things about with them, as they certainly are, that they did not carry about forty or fifty years ago, such as a bath, that would not prevent its being personal luggage; but when one comes to consider an article of this kind, which is an article of a totally different character, it seems to me that it is excluded. It is a difficult question, but to my mind it is one of those questions which almost speak for themselves. A bicycle—however common it may be among people to carry bicycles about with them—cannot be said to be carried as luggage, in the sense of ordinary personal luggage.

Judgment for the defendants.

Solicitor for plaintiff: *Robert Todd.*

Solicitor for defendants: *R. Hill Dawe.*

(1) L. R. 6 Q. B. 612.

P. B. H.

C. A.
1898
Dec. 9.

[IN THE COURT OF APPEAL.]

NATIONAL TELEPHONE COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Agreement for Hire of Chattel in consideration of Yearly Payment—"Bond, Covenant, or Instrument of any kind whatsoever"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By an agreement in writing not under seal it was agreed between a telephone company and one R. that the latter should pay to the company the sum of 12*l.* per annum in advance for the hire of a private wire between his premises and the company's local exchange system, and the telephonic apparatus relating thereto, and that either the company or the lessee might put an end to the agreement by giving three calendar months' notice in writing expiring on the day previous to the rent being due in any year, and the company agreed to erect and maintain in working order the said wire and telephonic apparatus :—

Held, that the agreement was chargeable with an ad valorem duty of 7*s.* 6*d.*, under clause 1 of the heading, "Bond, Covenant, or Instrument of any kind whatsoever," in the 1st schedule to the Stamp Act, 1891, and not merely with a stamp duty of 6*d.* as an agreement.

Jones v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484, followed.

Thames Conservators v. *Inland Revenue Commissioners*, (1886) 18 Q. B. D. 279, commented upon.

Appeal from the judgment of a Divisional Court (Grantham and Channell JJ.) upon the following case stated by the Commissioners of Inland Revenue pursuant to the Stamp Act, 1891, s. 13.

1. On February 10, 1897, an instrument, of which a copy is hereinafter set out, was presented on behalf of the appellants, the National Telephone Company, to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

2. The following is a copy of the instrument, which is upon paper headed, "The South of England Telephone Company, Limited—Head Offices, 50, Old Broad Street, E.C. No. 900" :—"March 9th, 1886.—The undersigned hereby agrees with the South of England Telephone Company,

Limited (subject to above conditions) to pay them the sum of twelve pounds per annum yearly in advance, the first payment to be made on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the undersigned, and each subsequent payment to be made on the corresponding day in each and every following year, for the use of a private wire between No. 155, North Street and the South of England Telephone Company's local exchange system in Brighton. Either the company or the lessee may put an end to this agreement by giving to the other three calendar months' notice in writing expiring on the day previous to the rent being due in any year. No verbal notice can be recognised.—Signature of renter. (Signed) Samuel Ridley.—N.B. All rentals are payable yearly in advance and the first year's rent becomes due on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the renter."

3. The conditions referred to in the agreement as "above conditions" are thirteen in number, and are as follows: "(1.) The company agrees to erect and maintain in working order subject to the provisions contained herein the undermentioned wire and telephonic apparatus relating thereto. (2.) The renter agrees to hire from the company the said wire and apparatus and to pay at the head offices of the company for the time being for the use of the same the amount and in the manner specified below. (3.) The renter shall take good care of the wire and apparatus and of all the fixtures and accessories connected therewith, and shall not damage, alter, or remove the same, nor allow it to be damaged, altered, or removed, nor make, nor suffer to be made any attachments to the same, and shall not obliterate nor allow to be obliterated any marks, words, or numbers which may be written, painted, stamped, or impressed thereon. (4.) The renter shall not send, nor permit to be sent, nor receive, nor permit to be received by or through the said wire or apparatus any message in respect of which any money or other consideration of any kind shall be given, paid, or promised. (5.) The renter shall permit the company, its agents and workmen to have access at all times to his premises

C. A. 1898

NATIONAL TELEPHONE COMPANY v. INLAND REVENUE COMMISSIONERS.

and to every other place under his control through or over which any part of the said wire or apparatus passes or to which any part of the said wire or apparatus is fixed. (6.) The company shall not be liable for any loss or damage which may be occasioned through the interruption of telephonic communication from any cause whatever, but in case of accident they shall make every effort to repair the said apparatus within twenty-four hours after the receipt at the head office of a written notice of such accident. (7.) The company may disconnect without notice and without prejudice to the other clauses of this agreement any subscriber whose rent—either for exchange or private wire or both—is overdue, and such subscriber shall remain liable for his rent just as if no disconnection had taken place. (8.) If the rent shall be in arrear or unpaid for fourteen days next after the days and times herein appointed for payment of the same, or if there shall be any breach or non-observance of the terms of this agreement by the renter, the company may determine this agreement by notice to the renter sent through the post addressed to him or left for him at the address below or at any other address to which the said wire or apparatus may have been removed with the consent of the company, and such agreement shall determine as from the time of giving such notice but such determination shall not prejudice or affect the rights or remedies of the company in respect of anything done or omitted by the renter prior thereto. (9.) If the name of any renter shall be officially published as a bankrupt or insolvent debtor or an outlaw the company shall be entitled to at once recover the wire and apparatus and any money paid on account of rental or otherwise shall be forfeited. (10.) On the determination of this agreement by any means the renter shall surrender to the company the said wire and apparatus with all fixtures and accessories in as good condition as when received, ordinary wear only accepted, and the company may forthwith remove the same, and for that purpose shall have access at all reasonable times through its agents and workmen to the premises of the renter and to all other places under the control of the renter through which any part of the wire or apparatus passes or to which it is fixed.

(11.) This agreement is subject to all proper wayleaves, permissions for attachments, poles, and other easements being obtained and retained by the company. (12.) The renter covenants to give every facility in his power in the way of poles, attachments, &c., to the company for running his own wire and also those of other subscribers to the company's system, whether exchange or private. (13.) If two or more lines—whether exchange or private—are ordered at the same time, it is distinctly understood and agreed that each line is to be paid for on completion in accordance with the terms of this agreement, unless specially arranged in writing to the contrary, and that each agreement stands on its own merits, subject, however, to the provisions contained herein."

4. At the date of the application to the commissioners the instrument was in full force as between the parties thereto (except that the business of the South of England Telephone Company, Limited, had been united with that of the appellants), and no notice to determine it had been given.

5. The commissioners were of opinion that the instrument was the only or principal or primary security for the sum of 12*l.* payable annually for an indefinite period, that such sum was neither interest for any principal sum secured by a duly stamped instrument nor rent reserved by a lease or tack, and that the instrument was chargeable under the head "Bond, Covenant, or Instrument of any kind whatsoever" in the 1st schedule to the Stamp Act, 1891, with the duty of 7*s.* 6*d.*, being the ad valorem duty of 2*s.* 6*d.* for every 5*l.*, and also any fractional part of 5*l.* of the 12*l.*, the sum annually payable by the said Samuel Ridley to the appellants. They assessed the duty thereon accordingly, and the instrument has been stamped in conformity with the assessment.

6. The appellants, being dissatisfied with the assessment, have, in pursuance of the 13th section of the Stamp Act, 1891, required the commissioners to state and sign a case setting forth the questions on which their opinion was required and the assessment made by them, and the commissioners do hereby state and sign this case accordingly.

7. The questions for the opinion of the Court are:

C. A. 1898

NATIONAL TELEPHONE COMPANY v. INLAND REVENUE COMMISSIONERS.

"(1.) Whether the instrument is chargeable with the duty of 7*s.* 6*d.*, in accordance with the assessment of the commissioners? (2.) If not, with what duty the instrument is chargeable?"

The Divisional Court gave judgment in favour of the Crown.

Asquith, Q.C. (*Roskill* with him), for the appellants. The question is whether this instrument is chargeable under the Stamp Act, 1891, with a stamp duty of 6*d.* as an agreement, or under clause 1 of the heading "Bond, Covenant, or Instrument of any kind whatsoever" in the 1st schedule to that Act, with an ad valorem duty of 2*s.* 6*d.* for every 5*l.* and fractional part of 5*l.* of the sum periodically payable. It is submitted that the instrument in question is not "the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods" within the meaning of the schedule. It is merely an agreement for the hire of a chattel and the services of the company in connection therewith in consideration of the payment annually of a sum of money. The proper meaning of the term "security" is something by way of safeguard or supplement to an anterior obligation—something that assures performance of a promise. It is not denied that security may be given or created by the same instrument which creates the obligation for which it is a security, as in the case of a debenture; but it it is essential to the idea of a "security" that there should be a separately existent obligation for which it is the security. The term is not properly applicable to an instrument which merely creates an obligation, or to a case where there is no security as distinct from the obligation. The consequences of the contention put forward for the Crown would be most sweeping, and can never have been intended by the Legislature. An agreement for hire of a carriage and the services of a coachman from a livery-stable keeper, in consideration of periodical payments, would be chargeable with the ad valorem duty as a security, if this instrument be so chargeable. Such an agreement could not either in legal or ordinary parlance be called a "security." The primary purpose of the instrument must be looked to. Is that purpose the hire

of an apparatus in consideration of a sum of money, or the giving of security for payment of a sum of money? The contention for the Crown amounts to a contention that any instrument evidencing an obligation to pay sums of money at stated periods is chargeable with the duty claimed. That cannot be the meaning of the Act. The cases relied upon by the Crown in which an instrument has been held to come within the heading of the schedule in question are cases of instruments under seal. It may, perhaps, be the case that an instrument under seal, which has certain advantages over an instrument under hand only, such as that it imports consideration, may more readily be brought within the term "security." In *Jones* v. *Inland Revenue Commissioners* (1), *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* (2), and *Clifford* v. *Inland Revenue Commissioners* (3), which were decisions in favour of the Crown, the instrument was under seal. In *Thames Conservators* v. *Inland Revenue Commissioners* (4), an agreement not under seal, by which permission was granted to erect and maintain a jetty in consideration of an annual payment, was held to be chargeable only as an agreement.

[They also cited *Mounsey* v. *Stephenson*. (5)]

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), and *Danckwerts*, for the Crown. This instrument clearly comes within the words "instrument of any kind whatsoever," and there can be no valid distinction for this purpose between an instrument under seal and one under hand only. It is argued that this instrument is not a security, because it is merely the instrument which creates the liability, and that "security" means something collateral or auxiliary to a previously existing obligation. That such is not the true construction of the Act is shewn by the words of exception in the part of the clause referring to annuities, "except upon the original creation thereof by way of sale or security, and except a superannuation annuity," and by the exception of "rent reserved by a lease or tack," which obviously excepts the instrument originally

(1) [1895] 1 Q. B. 484.
(2) (1872) L. R. 7 Ex. 211.
(3) [1896] 2 Q. B. 187.
(4) 18 Q. B. D. 279.
(5) (1827) 7 B. & C. 403.

C. A. 1898

NATIONAL TELEPHONE COMPANY v. INLAND REVENUE COMMISSIONERS.

creating the rent as being chargeable under another heading in the schedule, namely, "Lease or Tack." A further answer to the argument may be based upon the language of clause 2 of the same heading in the schedule and other parts of the schedule. Under the heading "Mortgage, Bond, Debenture, Covenant," in the schedule, a bond or covenant, being the only or principal or primary security for the payment or repayment of money, is chargeable with certain specified ad valorem duties. Under that heading a bond or covenant under which the obligation to pay or repay money originally arises, and which is not, therefore, a collateral or auxiliary security for an independently existing obligation, is a security within the meaning of the Act, as is clearly shewn by clause 2 of the heading, which imposes a lower duty where the instrument is a collateral, or auxiliary, or additional, or substituted security. The interpretation of the word "security" must be uniform in relation to the various headings in the schedule. Documents not under seal which create a liability are often called securities, as, for instance, a promissory note. [They cited on this point *Levy* v. *Abercorris Slate and Slab Co.* (1)] The passing of the Stamp Act, 1891, was subsequent to the decision in *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* (2), and therefore it must be taken that it was framed in view of that decision. The decision in *Jones* v. *Inland Revenue Commissioners* (3) covers this case, and it is submitted that it was right. *Mounsey* v. *Stephenson* (4) was merely a decision that the instrument there in question was admissible in evidence at nisi prius, being sufficiently stamped for the purpose for which it was sought to use it, although it might not be sufficiently stamped for another purpose. It is not a decision on the question what stamp the instrument ought to bear.

[They also cited *Mersey Docks and Harbour Board* v. *Inland Revenue Commissioners.* (5)]

Asquith, Q.C., in reply. In the case of a promissory note

(1) (1887) 37 Ch. D. 260.
(2) L. R. 7 Ex. 211.
(3) [1895] 1 Q. B. 484.
(4) 7 B. & C. 403.
(5) [1897] 2 Q. B. 316.

there is something more than a mere agreement to pay money; for the instrument is negotiable, and may be regarded as a collateral security for the debt in respect of which it is given. In *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* (1), the point now taken was not expressly raised; so the argument that the language used in the Stamp Act, 1891, had reference to that decision falls to the ground. The point was expressly raised in *Thames Conservators* v. *Inland Revenue Commissioners* (2), in which the decision was against the Crown.

A. L. SMITH L.J. I am of opinion that this appeal fails. I was at first somewhat taken by the case, put by the appellants' counsel in the course of his argument, of a simple contract for the hire of a carriage. He asked whether such a contract could be properly called a security. The question, however, is, not what in ordinary parlance could be called a security, but what is the meaning of the word "security" in this taxing Act; and it seems to me that, when the Act is fully considered, the meaning of the word as used therein is fairly defined by the Act itself. The words of the Act are, "Bond, Covenant, or Instrument of any kind whatsoever (1.) being the only, or principal, or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity) or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack. . . . for the term of life or any other indefinite period." I will take the words "bond" and "covenant" first of all. A bond given for the payment of a sum of money at stated periods, or a covenant given for such payment, is clearly a security within the meaning of the Act. Then I come to the subsequent words, upon which the question in the present case depends, "or instrument of any kind whatsoever (1.) being the only or principal or primary security . . . for any sum or sums of money at stated periods." Those words, in my opinion, cover a contract in writing, such as this, for the payment of

(1) L. R. 7 Ex 211. (2) 18 Q. B. D. 279.

C. A. 1898

NATIONAL TELEPHONE COMPANY v. INLAND REVENUE COMMISSIONERS.

A. L. Smith L.J.

a sum of money at stated periods. I cannot sever the word "instrument" from the words "bond" and "covenant" which accompany it; and, as a bond or a covenant for the payment of a sum of money at stated periods is within the Act, I cannot see how I can hold that a contract in writing to the same effect is not within it. It was argued that a "security" only means something auxiliary to an antecedent obligation, and therefore that a simple contract for the payment of 12*l.* a year for the use of a telephone is not a security within the meaning of the Act. But in my judgment that is a wrong reading of the Act. I think that the word "security," as used in the Act, clearly includes an instrument by which the obligation to pay is originally created. In addition to the argument founded by the Solicitor-General upon the exception made in the case of "rent reserved by a lease or tack," which obviously refers to the stamp upon the original instrument by which the rent is created, and not to any auxiliary security, the construction which I am putting upon the Act is fortified by the subsequent words in another part of the schedule under the heading "Mortgage, Bond, Debenture, Covenant." By clause 1 of that heading such an instrument "being the only, or principal, or primary security (other than an equitable mortgage) for the payment or repayment of money," is chargeable with a certain ad valorem duty, and by clause 2 such an instrument "being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage) or by way of further assurance for the above-mentioned purpose where the principal or primary instrument is duly stamped," is chargeable with a lower ad valorem duty. Under this heading it is clear from the words of clause 2 that clause 1 applies to an instrument under which the original obligation to pay or repay money arises.

On these grounds I am of opinion that, upon the true construction of the statute, a contract in writing, whereby, as in this case, an obligation is undertaken to pay a certain sum of money at stated periods for an indefinite period, is chargeable under the heading "Bond, Covenant, or Instrument of any kind whatsoever," in the 1st schedule to the Stamp Act, 1891. I am alive to the far-reaching result of this judgment, but, if altera-

tion is to be made, it must be by legislation. The above being in my judgment the true construction of the statute, I think that the case of *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* (1), and the case of *Jones* v. *Inland Revenue Commissioners* (2) which was decided by my brothers Wright and Collins, were rightly decided. I have read the judgments delivered in the latter case, and I agree with them entirely. For these reasons I think the judgment below must be affirmed.

RIGBY L.J. I agree. I think there cannot be a doubt that the contract in writing which is in question comes within the heading "Bond, Covenant, or Instrument of any kind whatsoever" in the 1st schedule to the Stamp Act, 1891. It appears to me clear that what are called "personal securities" are "securities" within the meaning of that portion of the schedule. Obviously they are, if they are created by bond or covenant; and I cannot distinguish this case in any way by reason of the fact that the instrument in question is not under seal. The phrase "personal security" is almost as common as "real security." The latter is associated with property, but "personal security" refers to something which has not property at the back of it, but is a mere personal obligation. I also agree that the words of the schedule in question include securities by which the obligation to pay money is originally created. The exception in the case of certain annuities shews this, for it shews that the Legislature thought that the instruments originally creating such annuities would, if not excepted, be included by the words: and the same observation is applicable to the exception in respect of rent reserved by a lease, which would be reserved by the lease itself, and not by another instrument. However much we may be struck by the sweeping nature of the clause, I do not see where we can draw a line in construing it. The counsel for the appellants was obliged to concede that a bond or covenant for the payment of money would be within it. He suggested, however, that there would be something beyond a mere personal obligation in the case of

(1) L. R. 7 Ex. 211. (2) [1895] 1 Q. B. 484.

C. A. 1898

NATIONAL TELEPHONE COMPANY v. INLAND REVENUE COMMISSIONERS.

a promissory note. I do not see it myself. A promissory note is simply a personal security. On the whole, I think that the cases of *Limmer Asphalte Co.* v. *Inland Revenue Commissioners* (1) and *Jones* v. *Inland Revenue Commissioners* (2) were rightly decided, and should be followed.

COLLINS L.J. I am of the same opinion. I confess that I was startled at the outset of the case by hearing that I was a party to a decision which did not primâ facie commend itself to my judgment; but, having heard the argument and had the opportunity of refreshing my memory by looking through the judgments in *Jones* v. *Inland Revenue Commissioners* (2), the case referred to, I cannot see any escape from the conclusion at which I there arrived. I have nothing to add to what I said in that case, except that, in citing the case of *Taylor* v. *Pendleton Overseers* (3), I obviously was making a mistake and confounding it with *Thames Conservators* v. *Inland Revenue Commissioners* (4), and all I said there had reference to the latter case, and not to *Taylor* v. *Pendleton Overseers* (3); and I must say, after reading it again, that I think the decision in *Thames Conservators* v. *Inland Revenue Commissioners* (4) is open to the observations which I then ventured to make on it.

Appeal dismissed.

Solicitor for appellants: *W. E. L. Gaine.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) L. R. 7 Ex. 211.
(2) [1895] 1 Q. B. 484.
(3) (1887) 19 Q. B. D. 288.
(4) 18 Q. B. D. 279.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1898
Dec. 17.

LOWE *v.* PEARSON.

Employer and Workman—Accident to Workman—"Arising out of and in the course of the Employment"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A boy was employed in a pottery; his duty was to make balls of clay and hand them to the woman working at a machine, and he was forbidden to interfere in any way with the machinery. He sustained an injury through attempting to clean the machine while the woman was temporarily absent:—

Held, that the accident did not arise out of or in the course of his employment, and therefore he was not entitled to compensation under the Workmen's Compensation Act, 1897.

APPEAL from the decision of a county court judge upon questions of law arising upon a claim for compensation for personal injury occasioned by an accident under the Workmen's Compensation Act, 1897.

The appellant was the proprietor of a pottery, and the respondent was a boy of about fifteen years of age who had been in his employ. The respondent was employed as a ball maker in the pottery, his duty being to make clay into a ball, put it into a mould, and hand it to a woman employed in working at a machine driven by steam. She then had to put it into a part of the machine called the cap, which was driven by two revolving cones that worked underneath boarding by which they were protected. The evidence was that it was no part of the respondent's duty to interfere with the machinery in any way, and that he had received express instructions not to do so. The cones sometimes got clogged with waste clay, and in that case it was the duty of the woman to summon a workman employed by the appellant to clean them. On the occasion in question, the supply of clay running short, the woman left the machine and went to another floor of the building to obtain a fresh supply. She stated that the machine was then working properly, and did not require cleaning. While she was gone, the respondent got under the boarding by which the machinery

C. A. 1898

LOWE v. PEARSON.

was boxed in, for the purpose, as he said, of cleaning the cones, and, getting his hand caught in the machinery, sustained damage to his fingers. The county court judge found as a fact that it was against rules that the respondent should clean the cones, and that he attempted to clean them, knowing that it was not his duty; but he nevertheless held that the injury was received by the respondent by an accident arising out of his employment. The judge further held that, though he found as a fact that the respondent knew that it was against orders for him to clean the cones, and that he went about the cleaning in a careless and reckless manner, yet that he was attempting to clean the cones with the view of furthering the work, and that his conduct did not amount to serious and wilful misconduct. He thereupon proceeded to assess the compensation to which he held the respondent to be entitled.

C. A. Russell, Q.C. (*J. H. Etherington Smith* with him), for the appellant. There were two questions raised in this case, the first being whether the accident arose out of and in the course of the respondent's employment, the second whether he was guilty of serious and wilful misconduct. It is clear upon the evidence and findings of the county court judge that the accident in this case did not arise out of or in the course of the respondent's employment. It arose while the respondent was doing something wholly outside the scope of his employment, and which he had been expressly forbidden to do. It may be that, if the workman were doing something which he was employed to do, the fact that he was doing it in a manner which was contrary to rules, would not make it the less a thing done in the course of his employment; but that is not the present case. In order that a workman may be said to be acting in the course of his employment, he must be doing the work which he was employed to do or something incidental thereto. The servant cannot by his own act make that part of his employment which is not so in fact. The test is not the same where the question as to the scope of the employment arises between the master and the servant as it is in a case where the question is as to the liability of the master to third

persons for the act of his servant. The county court judge has found that the respondent did what he did with a view of furthering the work; but it was not in furtherance of the work which he was employed to do. The servant cannot extend the scope of his employment by doing something which he may consider to be in furtherance of the work, but which is in fact quite outside the work which he was employed to do by the master. There was no necessity whatever for the respondent to clean the machine. This is not, therefore, like the case of a servant upon an emergency doing something outside the scope of his ordinary employment for the benefit of his master. That case might possibly admit of other considerations, but there was nothing in the nature of an emergency here. [He cited on this point *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1); *Englehart* v. *Farrant & Co.* (2)]

If it be necessary, the appellant contends that the only possible conclusion from the evidence is that the accident arose from serious and wilful misconduct on the part of the respondent.

The respondent was not represented by counsel.

A. L. SMITH L.J. I am of opinion that the decision of the county court judge cannot be upheld. The question in this case is whether an accident that happened to a boy employed in a pottery, which was a factory within the meaning of the Workmen's Compensation Act, 1897, arose out of and in the course of the boy's employment. I wish to emphasize what the appellant's counsel said about this case not being one of an emergency. It is not the case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master. I reserve the question what our decision in such a case ought to be till it arises. In this case the respondent was employed in the mere manual labour of making balls of clay, and handing them to the woman employed in working the machine. It was no part of his duty to touch the machinery, but on the contrary he was expressly ordered not to do so. In

(1) W. N. (1898) 165. (2) [1897] 1 Q. B. 240.

C. A. 1898

LOWE v. PEARSON.

A. L. Smith L.J.

spite of these orders he meddled with the machinery, and got his fingers injured. He has said that he was endeavouring to clean the machine; but it was not his duty to clean the machine, and he had no business to touch it. This was deputed to others. The county court judge has found that the respondent was not guilty of serious and wilful misconduct, because he did what he did with a view of furthering the work; but it does not appear to me that the finding is of any importance as bearing on the first question, namely, whether the accident arose out of and in the course of the respondent's employment. I do not see how it can possibly be said that it did so arise. It is not as if he was employed to do something which might involve him in dealing with or bring him into contact in any way with the machinery. The county court judge finds that he knew that it was against orders for him to touch the machine; and the evidence shews that he was solely employed in manual labour in making clay balls, and had nothing to do with the machinery at all. The appeal must be allowed.

RIGBY L.J. This is a claim by an infant against his employer, and, as the infant was not represented, I have thought it right to endeavour to test as closely as possible the argument presented to us on behalf of the employer. But, having done so as carefully as I could, I cannot come to the conclusion that the claim is well founded. The evidence shews that it was the duty of the respondent to confine himself to the work of making clay balls, and that he was expressly warned and well knew that he must not meddle with the machinery. The operation of cleaning the machinery was not, so far as one can see from the evidence, one that could be entrusted to the first comer. The woman, who worked the machine, herself said that it was not her duty to clean the machine, but it was her duty, when it wanted cleaning, to apply to another employee of the appellant, who was presumably more accustomed to machinery, and therefore more likely to clean it properly. I can quite understand that an accident through machinery might under some circumstances be said to arise out of and in the course of the employment, although the workman was not actually employed to

work at the machinery; but in the present case the respondent deliberately and knowingly engaged himself in work which he was not engaged to do, but on the contrary had been forbidden to do, and which there was no necessity for his doing. The evidence shews that some knowledge of the machinery was necessary for that work, and apparently this unfortunate boy had no such knowledge, for the result of his meddling with the machine was that he at once got into difficulties with it, and his fingers were seriously injured. I cannot escape from the conclusion that the accident by which he sustained injury did not arise out of or in the course of his employment.

COLLINS L.J. I am of the same opinion. I think that we should be cutting out of s. 1 of the Act the governing words of it, if we were to hold that the employer was liable on the facts of this case. In order to fix an employer with liability under the Act, it is necessary, not merely that the workman should have been employed, and should have met with an accident during the period of his employment, but that the accident should have arisen out of and in the course of that employment. Therefore, in order to decide this case, it is necessary to ascertain what the employment of the workman was, and, when that is once ascertained, the case is concluded. The only question is whether the act which this boy was engaged in doing when he met with this accident was done in the course of his employment. He was endeavouring to clean the machine, and the evidence shews that his employment did not embrace the duty of doing anything of the kind. He was employed for the purpose of performing the mere unskilled manual labour of making clay balls and handing them to the woman working at the machine, and his duty did not involve his having anything whatever to do with the machine. In meddling with it, he was doing something entirely out of the course of his employment.

Appeal allowed.

Solicitors for appellant: *Stevens, Son & Parkes, for Jones & Middleton, Chesterfield.*

E. L.

C. A.
1898
Dec. 5.

[IN THE COURT OF APPEAL.]

BAXTER *v.* HOLDSWORTH.

Practice—Notice of Trial—Assizes—Summons for Directions—Jurisdiction—Order XXX., *rr.* 1, 2—*Order* XXXVI., *rr.* 14, 18, 18*a*.

Upon a summons for directions under Order XXX., r. 1, in an action to be tried at assizes, a judge has jurisdiction, although the defendant has not done anything to render himself liable to have terms imposed upon him as to notice of trial, to order that the defendant shall take notice of trial at a period less than ten days before the commission day, and that the case shall not come on for trial at the assizes until a day which will make the notice so given a ten days' notice of trial.

Laskier v. *Tekeian*, (1892) 67 L. T. 121, distinguished.

APPEAL from an order of Channell J. at chambers made as after mentioned.

The action was for the recovery of certain premises. Upon a summons for directions taken out by the plaintiff under Order XXX., r. 1, the master ordered that pleadings should be delivered in the action, that statement of claim should be delivered forthwith, statement of defence within ten days after delivery of statement of claim, and reply, if necessary, within one day, and that the action should be tried at Lancaster by a judge without a jury, but refused to make an order that the defendant should take short notice of trial. On appeal to the judge he, upon November 16, varied the master's order by ordering that the defendant should take such notice of trial as might be necessary for the next Liverpool assizes, if notice of trial were given the day after delivery of the statement of defence, that the case should not be tried before December 7, and that the venue should be Liverpool. Notice of trial was given by the plaintiff on November 26, the day after the delivery of statement of defence, for the next Liverpool assizes.

The commission day at Liverpool was November 28. The defendant appealed from the judge's order. (1)

(1) It has not been thought necessary to state the particular circumstances of the case in detail, the point reported being whether the judge had jurisdiction to make the order which he made, and not whether under the circumstances it was just to make it.

T. Willes Chitty, for the defendant. The learned judge had no jurisdiction to make the order which he made. Order XXXVI., r. 14, provides that ten days' notice of trial shall be given, and it is only where the defendant is in mercy, by reason of his having to seek some indulgence, that he can be put under terms to take a shorter notice of trial. The defendant has not in the present case done anything to render himself liable to have such terms imposed upon him. Then by rule 18 of the same order notice of trial elsewhere than in London or Middlesex is to be deemed to be for the first day of the then next assizes at the place for which notice of trial is given. It has always been the practice that in assize cases the notice of trial must be given ten days before the commission day. By rule 18*a*, where it is impracticable to give notice in time for the first day of the Autumn or Easter assizes at Manchester or Liverpool, notice may be allowed for the second, third, or fourth day of the assizes. It is clear that, except as provided by this rule, notice of trial cannot be given for any day after the commission day at assizes. It was never intended by the provisions of Order XXX., rr. 1, 2, with regard to the summons for directions, that the judge should have jurisdiction to alter the substantive provisions of the rules as to matters of procedure in cases where the defendant has not rendered himself liable to be put under terms. It was held by Lindley L.J. in *Locke* v. *White* (1) that, where there is a general rule in general language, and a specific rule upon a specific subject expressed in special terms, the specific rule must prevail. The object of Order XXX., rr. 1, 2, was to prevent the multiplication of summonses and other interlocutory proceedings, and enable the judge upon one summons to grant or refuse discovery, leave to administer interrogatories, and suchlike matters, and not to enable him to dispense with the specific provisions of other rules as to interlocutory matters. In this case the judge has ordered the defendant to take such notice of trial as may be necessary for the next Liverpool assizes, and, as by the rules the notice is to be deemed to be a notice for the first day of the assizes, he has really ordered the defendant to take two days' notice of trial.

(1) (1886) 33 Ch. D. 308, at p. 312.

C. A. 1898

BAXTER v. HOLDSWORTH.

It was held by the Court in *Laskier* v. *Tekeian* (1), under the then existing rules as to summons for directions, which were in substance similar to the present rules, that such an order could not be made. The decisions shew that the provisions of Order LXIV., r. 7, which give power to enlarge or abridge the time appointed by the rules for doing any act or taking any proceeding, do not enable a judge to shorten the length of the notice of trial: *Saunders* v. *Pawley* (2); *Pilcher* v. *Hinds.* (3)

Sanderson, for the plaintiff, was not called upon to argue.

A. L. SMITH L.J. This case raises the following point of practice. By the order which the learned judge made the defendant will have ten days' notice of trial before the day on which the trial can come on, though not before the commission day at the assizes; and the question is whether the judge had power under the rules to make that order. It was argued that to hold that he had would upset the whole practice on the subject as it has existed from time immemorial. I do not think it will do anything of the sort, for, in the absence of an order by a judge, the notice of trial necessary in a case to be tried at assizes will be the usual notice of ten days before the commission day. But the question is whether under the rules the judge has not jurisdiction to make a special order in special cases to the effect that the defendant shall take notice of trial at assizes ten days before the case comes on for trial. I do not say that the judge has power to make the defendant take a notice of less than ten days before the case comes on for trial, and I think he has not, unless the defendant has been obliged to seek some indulgence and has so put himself in mercy as regards notice of trial. What I said in the case of *Laskier* v. *Tekeian* (1) was that the defendant could not be made to take less than ten days' notice of trial, unless he had put himself in mercy, and in this I agree. What is now argued is that the defendant is entitled to ten days' notice before the commission day, even if, as in the present case, the action is not to come on for trial till ten days after the commission day;

(1) 67 L. T. 121. (2) (1885) 14 Q. B. D. 234.
(3) (1879) 11 Ch. D. 905.

and that, if notice of trial ten days before the commission day cannot be given, the trial must go over to the next assizes. I do not think that is so. By Order XXXVI., r. 14, it is provided that "ten days' notice of trial shall be given, unless the party to whom it is given has consented, or is under terms or has been ordered to take short notice of trial, and shall be sufficient in all cases unless otherwise ordered by the Court or a judge." This rule does not say anything about the notice being given ten days before the commission day, though no doubt it has been the ordinary practice to give the notice ten days before that day. As I have said, I do not say that there is jurisdiction, where the defendant is not in mercy, to cut down the notice to less than ten days before the trial, but there is no question of doing that here. Then, by rule 18 of the same order, it is provided that "notice of trial elsewhere than in London or Middlesex shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given"; and by rule 18*a*: "in any case where it is found impracticable to give notice of trial in time for the first day of the Autumn or Easter assizes respectively, at Manchester or Liverpool respectively, such notice shall be allowed for the second, third, or fourth day of such respective assizes." There is nothing in these rules in my opinion to prevent a judge from saying, though in general the notice is to be deemed to be given for the first day of assizes, that in a special case the defendant shall take ten days' notice of trial before the hearing. Then I come to Order XXX., r. 2, by which it is provided that, upon hearing the summons for directions, "the Court or a judge shall, so far as practicable, make such order as may be just with respect to all the interlocutory proceedings to be taken in the action before the trial, and as to the costs thereof, and more particularly with respect to the following matters:—pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial." I think that the judge had power under that rule to make the order which he made, if it was just to do so, and it seems to me that under the

C. A. 1898

BAXTER v. HOLDSWORTH.

A. L. Smith L.J.

circumstances of this case it was clearly just to do so. It was urged that to decide that the order in this case was rightly made would be inconsistent with what I decided in the case of *Laskier* v. *Tekeian*. (1) That is not so. What I decided there was this: the venue in that case being Middlesex, and the notice of trial being given for Lancashire, the notice as given was a nullity; and, the effect of the registrar's order to change the venue to Lancashire being that the defendant would not get ten days' notice before the trial, I said that such an order could not be made, the defendant having done nothing to render him liable to be put under terms as to taking short notice of trial. The question was not raised in that case whether there was jurisdiction to order the defendant to take ten days' notice before the trial. It is said that the form of the order in this case is wrong, because it says that notice may be given for the next Liverpool assizes. I do not think that is wrong, having regard to the whole order. I think that it is competent for a judge when a case comes before him on a summons for directions to order, as my brother Channell did in this case, that notice of trial may be given for the next assizes, but that the case shall not come on for trial till such time as will give the defendant ten days' notice of trial. For these reasons I think the appeal must be dismissed.

RIGBY L.J. I am of the same opinion for the same reasons.

COLLINS L.J. I agree. The defendant's counsel has referred us to Order XXXVI., r. 18, and contended that, taking that rule in connection with rule 14 of the same order, the effect of the learned judge's order is to give the defendant only two days' notice of trial, and that, inasmuch as the defendant was not compelled to ask for any indulgence, there was no jurisdiction to impose such a term upon him. Whether there was jurisdiction to make the order which the judge made depends on the provisions of the rules. The jurisdiction which the judge was assuming to exercise in the present case is under Order XXX., r. 2, which provides that upon the hearing of a summons for

(1) 67 L. T. 121.

directions the judge shall, so far as practicable, make such order as may be just with regard to all interlocutory proceedings to be taken in the action before the trial. There are certain specific provisions in the rules with regard to these interlocutory matters which act automatically, unless the jurisdiction of the judge is invoked. The general rule of practice, as it existed before the summons for directions was introduced, no doubt was that the notice of trial at the assizes must be given ten days before the commission day. But now the rules with regard to the summons for directions have introduced a new procedure, under which the judge may be asked to give general directions as to interlocutory proceedings before trial, and he is with regard to them to make such order as may be just. There may be a case where, having regard to the facts which are before him, a judge thinks that the case ought to be tried at the next assizes, but the period fixed for those assizes is too near at hand to admit of giving notice of trial ten days before the commission day, and the judge may well know that the assizes will certainly last for several weeks. What in such a case upon the hearing of a summons for directions is the judge in a position to do? Is he obliged to refuse to make any order for shortening the ordinary period of notice, namely, ten days before the commission day, with the result that the case must wait for trial till a subsequent assize; or may he not, having regard to the whole scope of the rules on the subject, make such an order with respect to notice of trial as under the circumstances will be just? What would be just in such a case? There is on the part of the framers of the rules a clear intention that the defendant shall have ten days' notice of trial, and a general implication that the trial will take place on the first day of the assizes, because in ordinary cases it would take place on or within a day or two of that day; and therefore as a general rule the notice ought to be given ten days before that day; but where, in the case which is being dealt with, the assizes are certain to last several weeks, that general implication does not apply, and the main object of the rules, namely, that there should be ten days' notice of trial, can easily be attained by shortening the period of notice, and providing that the trial at the assizes shall not take

C. A. 1898

BAXTER v. HOLDSWORTH.

Collins L.J.

place until ten days have elapsed from the giving of notice of trial. This is exactly what the learned judge did in the present case. If he had jurisdiction, I think there was abundant justification under the circumstances of this case for the order which he made, and in my opinion the words of Order XXX., r. 2, do clearly give jurisdiction to make such an order. I think, for the reasons given by my Lord, that the case of *Laskier* v. *Tekeian* (1) does not preclude us from deciding as we are doing. In that case the order of the registrar involved a decision that the defendant should take less than ten days' notice of trial, for there was no condition superimposed that the trial should not take place before a certain date, as in the present case. Therefore the result was that the defendant, who had done nothing to put himself in mercy, was ordered to take less than ten days' notice of trial. That is not the case here, for the judge has made it a condition that the trial shall not take place till ten days after the notice given.

Appeal dismissed.

Solicitors for plaintiff: *Arkcoll, Cockell & Chadwick, for J. T. Sanderson, Lancaster.*

Solicitors for defendant: *Bell, Brodrick & Gray, for Walker, Tweedale & Clarke, Leeds.*

(1) 67 L. T. 121.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1898
Dec. 8.

THE SOUTHWARK AND VAUXHALL WATER COMPANY, APPELLANTS; THE HAMPTON URBAN DISTRICT COUNCIL, RESPONDENTS.

Practice—Appeal—Jurisdiction of Court of Appeal—Criminal Cause or Matter—Application to enforce General District Rate—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Local Government—Rates—District Rate—"Land covered with Water"—Artificial Reservoir—Proportionate Rating—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

An application to a court of summary jurisdiction for an order to enforce payment of a general district rate under the Public Health Act, 1875, s. 256, is not a criminal cause or matter, and therefore an appeal lies to the Court of Appeal from the judgment of a Divisional Court upon a case stated on such an application.

An artificial reservoir constructed by a waterworks company for the purpose of storing water is "land covered with water," within the meaning of s. 211 of the Public Health Act, 1875, and is therefore rateable to general district rates in the proportion of one-fourth part only of the net annual value thereof.

APPEAL from a judgment of the Queen's Bench Division on a case stated by justices on an application to enforce payment of a general district rate by a water company under the Public Health Act, 1875, s. 256.

The company were rated in respect of a reservoir, the rate being calculated on the full net annual value. They tendered a sum calculated on one-fourth of the net annual value upon the contention that the reservoir was "land covered with water," within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. (1)

The bed of the reservoir consisted of a lining of concrete

(1) 38 & 39 Vict. c. 55, s. 211: "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect; namely, (1.) . . . . (*b*) The occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

C. A. 1898

SOUTHWARK AND VAUXHALL WATER COMPANY v. HAMPTON URBAN COUNCIL.

9 inches thick, laid on the earth, which had been excavated so that the bed of the reservoir was below the surface of the surrounding land. The reservoir was surrounded on all four sides by an earthen embankment, lined with concrete 9 inches thick, and faced as to the upper 12 feet thereof with bricks 4½ inches in thickness; the whole being surmounted with a brick coping 14 inches in width. The embankment was used solely for the purpose of keeping the water in the reservoir, and varied from 10 feet to 18 feet in height above the natural surface of the ground, the total depth of the reservoir being 35 feet. The reservoir was used for storing water which was in part conducted to and in part pumped therein from the river Thames. It was covered permanently with water except when the reservoir was emptied for the purpose of cleaning it, which would take about a week. The reservoir had been constructed about three years, and had been cleaned once in that time, and would probably be emptied on an average once in two years.

The justices before whom the complaint came held that the reservoir was not "land covered with water," but was by reason of its construction in the nature of a vessel built with cement for the purpose of storing water, and that it was rightly rated on its full net annual value, and they made an order for payment accordingly.

The decision of the justices was reversed by the Divisional Court (Wright and Darling JJ.).

The district council appealed.

Dec. 7. *Sir E. Clarke, Q.C.*, and *Courthope-Munroe*, for the district council. It is right on the part of the appellants to this Court, before the argument of the case, to point out that it may be a preliminary question whether this appeal lies. In *Seaman* v. *Burley* (1) it was held that a judgment upon a special case stated by justices on an application to enforce payment of a poor-rate was a judgment in a criminal cause or matter, so that no appeal lay from it. In that case the application was under a local Act, the terms of which were similar to those of 12 & 13 Vict. c. 14, s. 2, which provides for the recovery of

(1) [1896] 2 Q. B. 344.

poor-rates in general. There has been a series of cases such as *Mellor* v. *Denham* (1), in respect of proceedings for the recovery of penalties and other sums of money recoverable before magistrates, in which it has been held that, as by the statutory provisions under which the proceedings were taken the magistrates could imprison the person in default, the proceedings were criminal in their nature, and no appeal lay to this Court. Under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), commonly called Jervis's Act, s. 22, in the case of orders, where the justices were authorized to issue warrants of distress, if no sufficient distress were found, the justices might commit the defaulter to prison. This provision applied in the case of the general district rate under the Public Health Act, 1875, s. 256. But by the Summary Jurisdiction Act, 1879, s. 6, provision was made to the effect that sums of money recoverable under any Act past or future on complaint to a court of summary jurisdiction, and not on information, should be deemed to be civil debts, and should be recoverable as such; and by s. 35 of the Act provision is made for the recovery of civil debts recoverable in a court of summary jurisdiction. That section provides that the order for payment of such a debt shall not, in default of distress, be enforced by imprisonment, unless it is proved that the person making default has or has had means to pay, and that in such case the Court shall have the same power of imprisonment as a county court has under the Debtors Act, 1869, in the case of a debt recovered in that court. It is clear that a proceeding under that section is not in its nature criminal. These provisions were not called to the attention of the Court in *Seaman* v. *Burley*. (2) The cases of *Mellor* v. *Denham* (1), *Reg.* v. *Whitchurch* (3), and *Ex parte Schofield* (4) were not within these provisions. The decision in *Seaman* v. *Burley* (2) may be based on the consideration that general provisions could not derogate from the special provisions of the local Act. Moreover, it was held in *Reg.* v. *Price* (5) that the Summary

(1) (1880) 5 Q. B. D. 467.
(2) [1896] 2 Q. B. 344.
(3) (1881) 7 Q. B. D. 534.
(4) [1891] 2 Q. B. 428.
(5) (1880) 5 Q. B. D. 300.

C. A. 1898

SOUTHWARK AND VAUXHALL WATER COMPANY v. HAMPTON URBAN COUNCIL.

Jurisdiction Act, 1879, did not apply to proceedings for the recovery of poor-rates on the ground that in the case of poor-rates the magistrates act ministerially and the rate is not recoverable through the order of a court of summary jurisdiction. If that be so, *Seaman* v. *Burley* (1) is distinguishable from the present case, for a general district rate is, by s. 256 of the Public Health Act, 1875, recoverable before a court of summary jurisdiction and clearly comes within s. 6 of the Summary Jurisdiction Act, 1879, and therefore is only recoverable as a civil debt recoverable before a court of summary jurisdiction. (2)

Cripps, Q.C., and *Ryde*, for the water company, stated that they did not wish to insist on the preliminary objection, as their clients desired the judgment of the Court of Appeal on the point raised by the case.

A. L. SMITH L.J. I have arrived at the conclusion that an appeal lies in this case to the Court of Appeal. There has been a series of decisions from the case of *Mellor* v. *Denham* (3) down to the case of *Seaman* v. *Burley* (1) dealing with the question as to what are criminal causes or matters, so that there cannot in respect of them be an appeal to the Court of Appeal, but in my opinion the present case is distinguishable from them all. The last-mentioned case was one in which the question arose as to proceedings to enforce payment of a poor-rate; and it was held following the others that such proceedings were in their nature criminal, because the matter might end in imprisonment, and that therefore no appeal lay from the judgment of a Divisional Court upon a case stated by justices thereon. In *Seaman* v. *Burley* (1) no reference was made to the provisions of the Summary Jurisdiction Act, 1879, which are now relied upon, presumably for the reason that they did not apply to proceedings to enforce a poor-rate, it having been decided in

(1) [1896] 2 Q. B. 344.

(2) Subsequently to the decision in *Reg.* v. *Price*, 5 Q. B. D. 300, the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13, sub-s. 11, was passed, but as to the effect of this, see *Boulter* v. *Kent Justices*, [1897] A. C. 556, and see Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 10.

(3) 5 Q. B. D. 467.

Reg. v. *Price* (1) that the Summary Jurisdiction Act, 1879, did not apply to such proceedings. The ratio decidendi in that case was, as appears from what was said by Cockburn C.J. in the course of the argument, that in the case of a poor-rate the money is not recoverable through an order of a court of summary jurisdiction, but the magistrates in granting the warrant of distress act ministerially, the rate itself being the order. In the case of the general district rate under the Public Health Act, 1875, s. 256, it is clear that the money is recoverable through the order of a court of summary jurisdiction. That being so, ss. 6 and 35 of the Summary Jurisdiction Act, 1879, apply. Sect. 6 provides that, "where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise." Then when we look to s. 35, which provides for the recovery of civil debts recoverable in a court of summary jurisdiction, we find that the order of such a court for the payment of any such civil debt shall not, in default of distress or otherwise, be enforced by imprisonment, unless it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same, and that in such case the Court shall have the same power of imprisonment as a county court would for the time being have under the Debtors Act, 1869, for default of payment if the debt had been recovered in that court, but shall not have any greater power. It is clear that the proceeding under this section for the recovery of a sum which is declared to be a civil debt recoverable summarily is not a criminal cause or matter. It is not like the proceeding under Jervis's Act (11 & 12 Vict. c. 43), in which justices may send a person to prison in default of distress. The general district rate comes

(1) 5 Q. B. D. 300.

C. A. 1898

SOUTHWARK AND VAUXHALL WATER COMPANY v. HAMPTON URBAN COUNCIL.

within s. 6 of the Summary Jurisdiction Act, 1879, and, therefore, s. 35 applies to the recovery of it. Consequently it follows that the proceeding for the recovery of such a rate is not a criminal cause or matter, and this appeal lies.

RIGBY L.J. and COLLINS L.J. concurred.

E. L.

The argument of the appeal then proceeded.

Dec. 8. *Sir E. Clarke, Q.C.*, and *Courthope-Munroe*, for the district council. The expression "land covered with water" means land in its natural state so covered, and does not apply to an artificial construction for industrial or commercial purposes. The reservoir in this case is nothing more than a large vessel constructed to hold water just as a cistern does. In *Peto* v. *West Ham* (1), the question arose in the case of a wet dock, under the General Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90), s. 33, on the construction of the words "property other than land," and the Court recognised the distinction between land used for agricultural and land used for commercial purposes, and the majority of the Court held that the property was assessable at the higher rate like other property, such as houses. That case was distinguished in *Reg.* v. *Neath* (2), where a canal and towing-path were held rateable under the same statute as land, and in *Reg.* v. *Midland Railway* (3) a line of railway was held rateable as land at the lower rate. In *Thursby* v. *Briercliffe with Extwistle* (4), a case arising under the same statute, it was held that a coal mine was property other than land, and doubt was thrown on the two last-mentioned decisions. In *Reg.* v. *Birmingham Waterworks* (5) a reservoir was held to be "land covered with water" within the meaning of a local Act, but it is difficult to gather from the description what the reservoir really was, and *Peto* v. *West Ham* (1) was not cited. In *Newport Dock Co.* v. *Newport Local Board* (6) the same question was raised

(1) (1859) 2 E. & E. 144.
(2) (1871) L. R. 6 Q. B. 707.
(3) (1875) L. R. 10 Q. B. 389.
(4) [1895] A. C. 32.
(5) (1861) 1 B. & S. 84.
(6) (1862) 2 B. & S. 708.

under the Local Government Act, 1858, with regard to a dock, and that case and *East London Waterworks* v. *Leyton Sewer Authority* (1), which arose under the Sewage Utilization Act, 1867, in respect of a canal and filter-beds, were decided in conformity with the decision in *Reg.* v. *Birmingham Waterworks*. (2) There is a conflict of authority, and as it cannot have been intended that where a large portion of the land of a parish is taken for purposes of profit the burden of the rates is to be thrown on the other ratepayers, the reservoir should not be treated as liable only to the one-fourth rating.

Cripps, Q.C., and *Ryde*, for the company. The cases under the General Lighting and Watching Act, 1833, arising on the interpretation of the words "property other than land" have no application to this case, which turns on the meaning of "land covered with water." If those words are held to mean land in its natural state and covered with water, they can have no application, because such land is not rated separately. The case is not merely covered by the authority of *Reg.* v. *Birmingham Waterworks* (2) in 1861, *Newport Dock Co.* v. *Newport Local Board* (3) in 1862, but the Legislature recognised those decisions by passing in 1867 the Sewage Utilization Act of that year, containing the words on which a judicial interpretation had been placed; and the Court of Queen's Bench in 1871, in a case under that statute, *East London Waterworks* v. *Leyton Sewer Authority* (1), followed its previous decisions.

Courthope-Munroe, in reply.

A. L. SMITH L.J. I think this appeal should be dismissed. Great skill has been shewn in the argument in support of the appeal; but I think there is an obvious fallacy in that argument in bringing forward a string of cases decided under the words of one Act, and attempting to treat them as authorities with regard to another Act and a different set of words.

The case before us arises under s. 211 of the Public Health Act, 1875, under which the company claim that they ought to be assessed as the occupiers of "land covered with water" on

(1) (1871) L. R. 6 Q. B. 669. (2) 1 B. & S. 84.
(3) 2 B. & S. 708.

C. A. 1898

SOUTHWARK AND VAUXHALL WATER COMPANY v. HAMPTON URBAN COUNCIL.

A. L. Smith L.J.

one-fourth part only of the net annual value. The section appears to me to be very clear if we confine ourselves to the words of it and do not entangle the matter with the words used in the General Lighting and Watching Act, 1833. Taking the primâ facie meaning of the words "land covered with water," they certainly appear to apply to a reservoir such as this. The argument that if the words do not apply to the reservoir in the present case there does not seem to be anything to which they can apply impressed me, for land naturally covered with water, such as a lake in a park, is not separately rated apart from the park. It is said the reservoir does not come within the scope of clause (*b*), because it is an artificial structure, built at great expense, excavated, concreted, and so on. Is that argument sound? Take the words that follow in the section "a railway constructed under the powers of any Act of Parliament for public conveyance," which also is to be rated on the one-fourth scale. Such a railway costs a large sum of money to make and is artificial; it cannot therefore be that because a large sum is spent in construction the thing constructed is not to have the benefit of the one-fourth scale. On the construction of the Act of 1875, unembarrassed by the cases on the construction of the General Lighting and Watching Act, 1833, I come to the clear conclusion that this reservoir is "land covered with water" within the meaning of the section.

Then how does the matter stand taking the cases and Acts of Parliament, pertinent to the present inquiry, in order of date? We have in 1861 the case of *Reg.* v. *Birmingham Waterworks* (1), decided on words identical with those in s. 211 of the Public Health Act, 1875, and it was held that a reservoir came within the description "land covered with water." The town council tried to rate the company on the full value of the reservoir, and the case came before the Court of Queen's Bench, composed of Cockburn C.J., Crompton and Blackburn JJ., a Court specially experienced in rating matters. The reservoir is therein described as made of stone, and it was clearly artificial, and the Court held that the reservoir was "land

(1) 1 B. & S. 84.

covered with water." Cockburn C.J. said that the argument of Mr. Lush for the corporation might be properly addressed to a committee of the House of Commons when dealing with legislation on the matter of the immunity of such reservoirs, but that the language of the statute was plain, and that it was impossible to say that the reservoir did not come within the description "land covered with water." It is said that *Peto* v. *West Ham* (1), a case under the General Lighting and Watching Act, 1833, was not referred to; but I am not surprised, as that case turned upon a statute which dealt with the words "property other than land," and a decision as to what comes within those words is no authority on the question as to what comes within the words "land covered with water."

The next case relating to the matter was *Newport Dock Co.* v. *Newport Local Board* (2) in 1862: that was also argued by Mr. Lush, and he cited *Peto* v. *West Ham.* (1) This case arose under the Local Government Act, 1858, s. 55, on words identical with those in the present case, and the Court of Queen's Bench followed their previous decision. The Court having thus twice over put a construction on the words "land covered with water," we find that in 1867 the Sewage Utilization Act (30 & 31 Vict. c. 113) was passed, and in that Act the expression is repeated. This appears to me to be a direct recognition by the Legislature of the correctness of the two decisions of the Court of Queen's Bench. In 1871 *East London Waterworks* v. *Leyton Sewer Authority* (3) came before the Court, and the same construction was put by Cockburn C.J., Blackburn, Mellor and Lush JJ., on the words "land covered with water" when applied to filter beds. Then came the Public Health Act, 1875, adhering to the same expression. In the face of these unanimous decisions I certainly cannot decide that this reservoir is not "land covered with water," and indeed apart from authority I think it is.

I will shortly dispose of the other cases cited in the argument. I have already pointed out that *Peto* v. *West Ham* (1) arose under the words "property other than land" in the

(1) 2 E. & E. 144. (2) 2 B. & S. 708.
(3) L. R. 6 Q. B. 669.

C. A. 1898

SOUTHWARK AND VAUXHALL WATER COMPANY v. HAMPTON URBAN COUNCIL.

A. L. Smith L.J.

General Lighting and Watching Act, 1833, and the same remark applies to *Reg.* v. *Neath* (1) and *Reg.* v. *Midland Railway*. (2) Lastly, there is *Thursby* v. *Briercliffe with Extwistle* (3), also arising under the same Act, and not applying in any way to the construction of the words of the Public Health Act, 1875. Whatever may have been said in that case by Lord Herschell in disparagement of some of the reasoning in the former cases under the Lighting and Watching Act, 1833, I cannot find anything which overrules the decisions given on the words of the other Acts which have been again repeated in the Public Health Act, 1875. The appeal will be dismissed.

RIGBY L.J. I am of the same opinion. I will only add a word as to a matter as to which I had a difficulty arising from the insertion of the word "canal" after the words "land covered with water." I think the words "or towing-path for the same" which follow "canal" explain the insertion of the latter word, because if it was intended to bring a towing-path within the clause, and that had stood alone, a doubt might have been raised as to whether a canal was included. As to the injustice to other ratepayers, I see none, because if a railway, or a canal, or a reservoir is made in a district, the other ratepayers get the advantage of the turning of agricultural land into property of greater value for rating purposes.

COLLINS L.J. I am of the same opinion, and on the same grounds. I only desire to say that I do not share the difficulty which my brethren in the Court below seem to have felt in following the cases decided on this point. I come to the conclusion that the appeal should be dismissed, not merely on the authority of a series of decisions, but also on the ground that they were rightly decided.

Appeal dismissed.

Solicitors for company: *Lanfear, Tanner & Lanfear.*
Solicitors for urban council: *Kent & Son.*

(1) L. R. 6 Q. B. 707. (2) L. R. 10 Q. B. 389.
(3) [1895] A. C. 32.

A. M.

[CROWN CASE RESERVED.]

1898
Dec. 10.

THE QUEEN *v.* SENIOR.

Criminal Law—Offences against the Person—Manslaughter—Infant Child—Neglect to procure Medical Aid—Conscientious Objection to Medical Aid—"Wilfully neglect"—Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict. c.* 41), *s.* 1.

By the Prevention of Cruelty to Children Act, 1894, s. 1: "If any person . . . . who has the custody, charge, or care, of any child . . . . wilfully . . . . neglects . . . . such child . . . . in a manner likely to cause such child . . . . injury to its health . . . . that person shall be guilty of a misdemeanour."

The prisoner was charged with the manslaughter of his infant child, of which he had the custody. He belonged to a sect who objected on religious grounds to calling in medical aid, and to the use of medicine, and he had wilfully and deliberately abstained from providing medical aid and medicine, which were necessary for the child, though he knew it to be dangerously ill, but in other respects he had done all he could in the best interests of the child. Medical aid would have prolonged, and probably saved, the child's life, and the prisoner had the means to procure medical aid:—

Held, that there was evidence that the prisoner had wilfully neglected the child in a manner likely to cause injury to its health, within the meaning of the Act, and having thereby caused or accelerated its death, he was rightly convicted of manslaughter.

CASE stated by Wills J.

The prisoner was indicted and tried at the Central Criminal Court for the manslaughter of his child, an infant of the age of eight or nine months. The child had died of diarrhœa and pneumonia. The prisoner had not supplied it with any medical aid or medicine, though aware that the case was of great gravity, and that the child would probably die. The medical evidence was that the child's life would certainly have been prolonged, and in all probability saved, if medical assistance had been procured. No question was raised as to the prisoner's ability to procure and pay for medical assistance, and it was shewn that he earned about 35*s.* a week. He was shewn to have been a good and kind father in all other respects, and he bore an excellent character for general good conduct.

1898

REG. v. SENIOR.

He had had twelve children, of whom seven were dead, and he had had before experiences of the same kind as those relating to the present inquiry, for the question he put to the inspector of police was, "except in regard to this case," and he then corrected himself—"except in regard to these cases, have you ever known anything against me?"

The prisoner was a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of sick people are certainly to the ordinary apprehension remarkable. They base them on the Epistle of James, chapter v., 14th and 15th verses:—"Is any sick among you? Let him call for the elders of the church; and let them pray over him, anointing him with oil in the name of the Lord; and the prayer of faith shall save the sick, and the Lord shall raise him up; and if he have committed sins, they shall be forgiven him." They do not allege that medical aid is here expressly forbidden, but say that to make use of it is to indicate a want of faith in the Lord. The learned judge inquired if they held that any other parts of the Scriptures—the Gospels, for instance—were of divine authority, and was answered that the Gospels certainly were so recognised. He also called attention to the fact that our Lord said, "They that are whole need not a physician; but they that are sick" (1), and asked why they thought that it could be wrong to consult a physician, if the sick man was pronounced on such authority to need a physician. The answer was that the sickness here alluded to was moral sickness or sin, and that the physician meant our Lord Himself. The learned judge inquired, further, if they held that it was wrong to give extra food, or wine, or brandy, to a sick person, or to put an extra blanket on his bed if the weather were cold, or the nature of his sickness required him to be kept warm. The answer was, no, that they gave the sick every species of comfort; and it appeared that the child had had much attention paid to its food and diet, though the medical witnesses did not think the dietary altogether judicious, and that it had had brandy administered. He inquired also if they objected to experienced nursing. They said no, and that they resorted to it, and did so in the

(1) Luke v. 31.

case of this child, but that the nursing must be by one of their own people, who would not use drugs.

It thus appeared distinctly that they did not object to the use of many human appliances and efforts to save the sick; but they drew the line at the doctors and drugs, and, the learned judge thought, at doctors, not so much on account of their superior knowledge of the human frame and its needs as because they are likely to use and prescribe drugs.

The learned judge told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance; and, secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and thirdly, that the prisoner's means would have enabled him to do so, without such an expenditure as could not be reasonably expected from him.

He then directed them upon the more difficult part of the case, and told them that, in order to make out a case of manslaughter by negligence of this kind purely at common law, the negligence must be gross and wanton, so much so as to indicate something, at all events, of an evil mind, and that it was impossible to say that of the prisoner, who was shewn to have spared neither expense nor care, and to have taken, in all respects but one, every precaution to do the best for the child.

But the learned judge added that if he had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind. The learned judge read to them the provisions of the statute 31 & 32 Vict. c. 122, s. 37 (1), which provided that "when any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging, for his child, being in his custody, under the age of fourteen years, whereby the health of the child shall have been or shall be likely to be seriously injured, he shall be guilty of an offence," and said that, had that statute been in force the case would have admitted of no

(1) This section was repealed by 52 & 53 Vict. c. 44, s. 18, and the latter Act is repealed by 57 & 58 Vict. c. 41, s. 28, sub-s. 2.

1898

REG. v. SENIOR.

doubt; but he told them that it had been repealed, and that the enactment now in force was contained in s. 1 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), which provides that, "If any person over the age of sixteen years, who has the custody, charge or care, of any child under the age of sixteen years, wilfully assaults, illtreats, neglects, abandons, or exposes, such child . . . . in a manner likely to cause such child unnecessary suffering, or injury to its health, ... that person shall be guilty of a misdemeanour," and that therefore, if the prisoner had brought himself within that statute, and the child had died in consequence, he would have caused the death of the child by a course of conduct forbidden by statute, and therefore unlawful, and would be guilty of manslaughter.

The learned judge said there could be no doubt that the prisoner had wilfully and deliberately abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that therefore the question was narrowed down to whether his failure to procure medical aid could be called "neglecting the child so as to cause serious injury to its health."

The learned judge pointed out that the language was very different from that of the repealed enactment, and said that "neglect" was not a word of art, but a word of ordinary English, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the day. He told them that it was for the jury to say whether any particular state of things which might be established came up to the description of "neglecting"—not to do a specific thing, as to supply medicine, in which case it would mean very little more than omitting or failing to do it, but to "neglecting a child," which was a very different thing, always bearing in mind that it must be to such a degree, and in such a manner, as to endanger its health.

1898

REG. v. SENIOR.

The jury found the prisoner guilty, adding that they considered medical aid and medicine to have been necessary for the child, but that they were of opinion that the prisoner had done all he could in the best interests of the child, except in not providing medical aid and medicine.

The learned judge said nothing to the jury as to whether the prisoner was acting bonâ fide and according to his conceptions of duty, because the learned counsel had in his opening speech said that it was not in question that he was so doing.

The prisoner was not represented by counsel, and the learned judge had not the advantage of any argument on his behalf as to the meaning of "wilfully neglects" in the Act (57 & 58 Vict. c. 41), and he therefore reserved the case for the opinion of the Court for Crown Cases Reserved.

The questions for the opinion of the Court were whether the learned judge's direction was right in law; and, if so, whether there was evidence upon which the jury could properly convict the prisoner. If both these questions were answered in the affirmative the conviction was to stand. If either was answered in the negative the conviction was to be quashed.

The prisoner was released on bail pending the decision of the Court.

H. Sutton, for the prisoner. The conviction was wrong. The prosecution will no doubt rely upon the decision of this Court in *Reg.* v. *Downes* (1), where, on a state of facts very similar to those now before the Court, a conviction for manslaughter was upheld. But that case was decided on the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 37, which contained the express words, "When any parent shall wilfully neglect to provide . . . . medical aid." The Act now in force, the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1, does not contain those words or any similar words. The words of that Act are, "wilfully neglects such child," and those words are not satisfied by proof of mere omission to provide medical aid. As to whether the prisoner could be convicted at common law, independently of the statute, the cases

(1) (1875) 1 Q. B. D. 25.

1898

REG. v. SENIOR.

are conflicting; but the balance of authority is against the liability to conviction. The case of *Reg.* v. *Hurry* (1), before Byles J., is in favour of the liability; but the ruling of Willes J. in *Reg.* v. *Wagstaffe* (2), and of Pigott B. in *Reg.* v. *Hines* (3), are against it, and serious doubt as to the existence of such a liability is expressed by Lord Coleridge C.J. and Bramwell B. in *Reg.* v. *Downes*. (4) In order to render a man liable in a case such as this, the neglect must be intentional. The summing-up, as stated in the case, does not sufficiently explain the meaning of the words "wilfully neglects," and therefore the first question asked should be answered in the negative, and the conviction quashed.

[WILLS J. Your argument is, that the direction ought not to have separated the word "wilfully" from the word "neglects."]

Yes. The meaning of the two words taken together should have been explained to the jury. [He also referred to Stephen's Digest of the Criminal Law, art. 232; *Rex* v. *Friend*. (5)]

Avory, for the prosecution, was not called on.

LORD RUSSELL of KILLOWEN C.J. We have to deal with a case reserved by Wills J. for the consideration of this Court. The charge is one of manslaughter, and it is founded upon the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1. Two questions arise on the case, first, whether the direction of the learned judge was right in law, and, if so, secondly, whether there was evidence upon which the jury could properly convict the prisoner. If the direction was wrong in point of law, or if the evidence was insufficient, the conviction cannot stand. The charge is preferred under s. 1 of the statute to which I have referred (57 & 58 Vict. c. 41), the material words of which are as follows: "If any person over the age of sixteen years, who has the custody, charge or care, of any child under the age of sixteen years, wilfully assaults, illtreats,

(1) (1872) 76 C. C. C. Sessions Paper, 63.
(2) (1868) 10 Cox, C. C. 530.
(3) (1874) 80 C. C. C. Sessions Paper, 309.
(4) 1 Q. B. D. 25.
(5) (1802) R. & R. 20.

neglects, abandons, or exposes, such child, or causes or procures such child to be assaulted, illtreated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour." It is desirable to refer to the history of the legislation dealing with this subject. The former statutory provision was contained in the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), s. 37 (a section since repealed), which provided that "When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging, for his child, being in his custody, under the age of 14 years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction." (1) Therefore under that statute it was made the duty of the parent, if he was able to do so, to provide medical aid for his child, where necessary, and if he did not do so he was guilty of an offence, and liable to punishment. That was followed by the Act of 1889 (2), which it is not necessary further to refer to, because the provisions of that Act were in effect the same as those of the Act now in force so far as the present case is concerned. It is important to observe that the Poor Law Amendment Act, 1868, was passed shortly after the trial of the case before Willes J., which has been referred to, *Reg.* v. *Wagstaffe*. (3) That case was tried in January, 1868, and the Act received the Royal Assent on July 31 of the same year, and there can be very little doubt that the clause in question (s. 37) was inserted in consequence of the decision, because the Legislature was of opinion that circumstances such as existed in the case of *Reg.* v. *Wagstaffe* (3) were not adequately provided for. There is, no doubt, considerable difference between the language of the Act now in force and that which was contained in the Act of 1868. In the Act now in force the expression "medical aid" does not occur, and it becomes necessary to consider

(1) Repealed by 52 & 53 Vict. c. 44, s. 18.

(2) 52 & 53 Vict. c. 44, repealed by 57 & 58 Vict. c. 41, s. 28, sub-s. 2.

(3) 10 Cox, C. C. 530.

1898

REG. v. SENIOR.

Lord Russell C.J.

whether the omission of those words makes any difference with regard to the present case. It would be an odd result if we were obliged to come to the conclusion that, in dealing with such a subject as the protection of children, the Legislature had meant to take what may be described as a retrograde step; for the course of legislation, and the provisions of the Act of 1894, shew an increased anxiety on the part of the Legislature to provide for the protection of infants. We must decide the case on the words of the statute. Before considering the summing-up of the learned judge, I will summarise the facts. [His Lordship shortly stated the facts set out in the case.]

The portions of the summing-up which it is necessary to refer to are the following: "I told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance; and, secondly, that medical aid and medicine were such essential things for the child, that reasonably careful parents in general would have provided them; and, thirdly, that the prisoner's means would have enabled him to do so, without an expenditure such as could not be reasonably expected from him." A little further on in the case the learned judge states as follows:— "But I added that if he had done anything which was expressly forbidden by statute, and by so doing had caused or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind." Later on he adds this: "I said there could be no doubt that the prisoner had wilfully and deliberately abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that therefore the question was narrowed down to whether his failure to procure medical aid could be called neglecting the child so as to cause injury to its health. I pointed out that the language was very different from that of the repealed enactment." The question is whether that direction was substantially right. I think it was. Whether the words in the statute, "wilfully neglects," are taken together, or, as the learned judge did in directing the jury, are taken separately, the meaning is very clear. "Wilfully" means that the act is

1898

REG. v. SENIOR.

Lord Russell C.J.

done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with the statement in the summing-up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation, which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect. Mr. Sutton contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary in the present case, he ought not to be found guilty of the offence of manslaughter, on the ground that he abstained from providing medical aid for his child in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where is the line to be drawn? In the present case the prisoner is shewn to have had an objection to the use of medicine; but other cases might arise, such, for instance, as the case of a child with a broken thigh, where a surgical operation was necessary, which had to be performed with the aid of an anæsthetic; could the father refuse to allow the anæsthetic to be administered? Or take the case of a child that was in danger of suffocation, so that the operation of tracheotomy was necessary in order to save its life, and an anæsthetic was required to be administered.

I think it cannot be doubted that, if this case had arisen under the Act of 1868, there would have been ample evidence to warrant a conviction, and in my opinion there is also ample evidence where the case arises under the Act of 1894. I am of

1898

REG. v. SENIOR.

Lord Russell C.J.

opinion that the summing-up of the learned judge was right, and the conviction ought to be affirmed.

I wish to add that I dissent entirely from the view attributed to Pigott B. in *Reg.* v. *Hines* (1), and I am not satisfied that in the present case there was not sufficient evidence, at common law, to justify a conviction.

DAY J. I entirely agree with the judgment of the Lord Chief Justice.

WILLS J. I am of the same opinion. I will not deal with the question whether the evidence might have justified a conviction at common law, because it is unnecessary here to decide that question. As to the rest of the case, I can see no reason to doubt that I was right in the direction which I gave to the jury; but I was anxious to have the point settled by this Court, because the same question is not unlikely to arise in other cases, and similar questions may also arise, and have arisen within my own experience, in proceedings under the Prevention of Cruelty to Children Act, 1894, in cases where the cruelty charged is not followed by death. For these reasons I thought it wise to reserve the point for the consideration of this Court, though I had not at the trial, and have not now, any serious doubt upon the question.

GRANTHAM J. I am of the same opinion, and I agree with the judgment of the Lord Chief Justice. Taking the last of the two words, "wilfully neglects," first, was the omission of what was left undone by the prisoner neglect? The jury say it was. Then was what was left undone wilfully left undone—that is, was the neglect to provide medical aid the wilful act of the prisoner? Mr. Sutton can only rely upon the fact that the prisoner was one of the sect called the "Peculiar People"; but that fact of itself goes to shew that what he omitted he left undone with intent—that is, wilfully. Can it be said that this is not wilful neglect? I am clearly of opinion that the prisoner's conduct amounted to wilful neglect, and that the summing-up of the learned judge was right. It may be asked,

(1) 80 C. C. C. Sessions Paper, 309.

1898

REG. v. SENIOR.

Grantham J.

why should the line be drawn at drugs? A case might arise where it was necessary to apply an instrument where an injury had been suffered. To omit to do that would be wilful neglect. Or take the case of a fever, where quinine was necessary, or ice. Suppose the doctor were to say, "I know that if ice is applied the fever will abate." Could the father refuse to allow the application of ice without being guilty of wilful neglect?

LAWRANCE and WRIGHT JJ. concurred.

Conviction affirmed.

Solicitor for the prosecution and for the prisoner: *The Treasury Solicitor.*

P. B. H.

BLACKMORE *v.* WHITE.

1898

July 28; *Dec.* 15.

Manor—Copyhold—Customary Obligation to Repair—Breach of Obligation by Tenant—Remedy of Lord against Tenant's Executors.

The testatrix of the defendants was admitted tenant for life of certain copyhold tenements of a manor. By the custom of the manor the tenants were bound to repair their tenements, and the only mode in which that obligation had been enforced had been by presentment, fine and forfeiture. Upon the death of the testatrix the premises were found to be out of repair. More than six months after the defendants, as her executors, had taken upon themselves the administration of her effects, the lord brought an action against them for dilapidations:—

Held, that the testatrix, by accepting the tenancy according to the custom of the manor, impliedly contracted to discharge the customary obligation to repair; that for the breach of her implied contract the lord was not confined to his customary remedy by presentment, fine and forfeiture, but had a remedy by action; and that that remedy by action, sounding in contract and not in tort, survived against her executors.

FURTHER CONSIDERATION before Lord Russell of Killowen C.J.

The plaintiff is the rector of Morchard Bishop, in the county of Devon, and as such rector he is lord of the "manor of the rectory of Morchard Bishop," of which manor the tenements are held by copy of court roll for lives according to the custom of the manor. By that custom a grant was formerly permitted

1898

BLACKMORE v. WHITE.

for three lives at one time in possession and reversion in consideration of a fine. The widow of a deceased tenant was entitled to hold the whole of her husband's tenement by way of freebench. The court rolls shewed that it was customary for a widow claiming freebench, or for a reversioner becoming entitled to possession, to be formally admitted at a court and to do fealty before taking possession. On January 21, 1846, the Rev. John Bartholomew, the then lord of the manor, granted a tenement, consisting of three cottages, to John Southcott and James Southcott "for the term of their lives and the longest liver of them according to the custom of the said manor yielding and paying therefor yearly one shilling . . . . and by all other burthens suits and services therefore due and of right accustomed." John and James Southcott were thereupon admitted tenants. On the same date the lord granted the reversion of the said tenement to Charles William Bartholomew for life according to the custom of the manor. In 1871 John Southcott died; and in the following year James Southcott died leaving a widow, Mary Southcott, who claimed freebench, and was duly admitted tenant of the premises for her life. In 1884 the plaintiff was instituted to the rectory of Morchard Bishop. On June 14, 1896, Mary Southcott died, having by her will appointed the defendants her executors. It was the custom of the manor for the tenants to repair their tenements, and that custom applied as well to widows admitted by way of freebench as to other tenants; but the only mode by which in practice that obligation to repair had ever been enforced against the tenants was by presentment, fine and forfeiture. On the death of Mary Southcott the premises were found to be much out of repair, but no presentment of that disrepair was made at the manor court. Notice of her death was given to the reversioner, C. W. Bartholomew, but he declined to be admitted, and in July, 1897, he died without ever having been formally admitted. The plaintiff, being himself liable as incumbent to repair the premises to the satisfaction of the diocesan surveyor, on April 5, 1898, brought his action against the defendants to recover the amount of the dilapidations resulting from their testatrix's neglect to repair. The action was tried before the

Lord Chief Justice at the Exeter Summer Assizes, 1898, without a jury, when the defendants admitted having assets, but it was contended on their behalf, first, that the lord's only remedies were by presentment, fine and forfeiture; secondly, that even if an action would have lain against the testatrix, it was an action of tort, and, being commenced more than six months after the defendants had taken on themselves the administration of her effects, it did not survive against her executors; and, thirdly, that, even if an action lay against the defendants, the reversioner C. W. Bartholomew, or his personal representative, and not the lord, was the proper person to have sued. The Chief Justice reserved the questions of law for further consideration.

Foote, Q.C., and *Howland Roberts*, for the plaintiff. The lord is not confined to the customary remedies of presentment, fine and forfeiture. That proceedings against his tenants are not limited to the manorial court is clear from the fact that an action of debt lies by the lord against a copyholder for the recovery of a fine: 1 Cruise, Dig. 4th ed. 303; and see form of indebitatus count for copyhold fines in Bullen and Leake, 3rd ed. 149. In *Richards* v. *Noble* (1) it was held by Lord Eldon that a lord may sue in equity for an injunction and account in respect of waste by a copyholder, and as regards the right to such an account no distinction is there drawn between voluntary waste and permissive waste. The fact that waste amounts to a cause of forfeiture does not oust the right of a Court of Equity to grant relief. In the earlier case of *Dench* v. *Bampton* (2) Lord Loughborough indeed held the contrary—that for waste a lord could neither have an action against his tenant nor an account: that he could "get no more than the forfeiture." But in *Parrott* v. *Palmer* (3) Lord Brougham treated the case of *Dench* v. *Bampton* (2) as overruled by *Richards* v. *Noble* (1), and added that, "the principle on which Lord Loughborough proceeded has never been considered a sound one." The plaintiff's cause of action in the present case is founded upon an implied contract

(1) (1807) 3 Mer. 673.
(2) (1799) 4 Ves. 700.
(3) (1834) 3 My. & K. 632, at p. 639.

1898

BLACKMORE v. WHITE.

to repair arising out of the testatrix's admission as tenant according to the custom of the manor. It being part of that custom that the tenants should repair their tenements, she must be taken to have accepted the tenancy upon the terms of her repairing. In *Woodhouse* v. *Walker* (1), where a devise of premises for life provided that the tenant for life should keep the premises in repair, it was held that an action in respect of permissive waste by non-repair of the premises would have lain against the tenant for life. The cause of action was there indeed treated as one of tort; but in the more recent case of *Re Williames, Andrew* v. *Williames* (2), where the facts were precisely similar, the neglect of the tenant for life to repair was treated by Kay J. as a breach of an implied contract to repair contained in the will. If that view was right upon those facts a fortiori ought the testatrix's neglect in the present case to be treated as a breach of contract, in which event the maxim Actio personalis moritur cum personâ has no application, and the lord's remedy survives against her executors.

As to the contention that the proper plaintiff was the reversioner or his legal representative, and not the lord, it is enough to say that the reversioner never was in fact admitted, and until admittance he had no such interest in the premises as would support an action for non-repair.

H. E. Duke, for the defendants. This is the first case in which an action has ever been brought against a copyholder for non-repair. There is no precedent for such an action to be found in the books. The inference is that the action will not lie. The case of *Dench* v. *Bampton* (3) is a direct authority in the defendants' favour. It may be that Lord Loughborough there went too far in refusing to apply the jurisdiction of the Equity Court to grant an injunction in a case of voluntary waste, but as regards permissive waste the principle there laid down is sound. The cases which have been cited of *Richards* v. *Noble* (4) and *Parrott* v. *Palmer* (5), where the equitable remedy of an injunction and account of waste was sought, were

(1) (1880) 5 Q. B. D. 404.
(2) (1884) 52 L. T. (N.S.) 41.
(3) 4 Ves. 700.
(4) 3 Mer. 673.
(5) 3 My. & K. 632.

cases of voluntary waste in cutting down timber or working minerals, in which cases the remedy would equally have been applicable against a person who was not a tenant of the manor at all. In the *Countess of Shrewsbury's Case* (1) it was held that an action on the case does not lie against a tenant at will for permissive waste. And in *Gibson* v. *Wells* (2) Mansfield C.J. said that there was no precedent for an action against a tenant at will for permissive waste in the absence of a contract by him to repair. And a copyholder is in theory a mere tenant at will according to the custom of the manor. No contract can be implied from the mere fact of admission. Upon admission the tenant is in, not by agreement, but by status, which leaves no room for any contract. The tenant's duty to repair arises out of the custom of the manor, and the lord's remedies for breaches of that duty are those provided by the custom of the manor, and those alone. In a manor the rights, duties, and remedies of the lord and his tenants are regulated wholly by custom. The question whether a tenant has broken the custom cannot be tried by a court of law. Secondly, if an action would have lain against the testatrix, it would have been an action on the case for permissive waste, which is in the nature of a tort, and as the action was not commenced within the six months allowed by 3 & 4 Will. 4, c. 42, the maxim Actio personalis moritur cum personâ applies. *Woodhouse* v. *Walker* (3) is an express authority to this effect. In that case, but for the fact that the action was begun within the period limited by the Act, the Court would have held that the cause of action was gone. It is true that in *Re Williames, Andrew* v. *Williames* (4) Kay J. is reported to have treated the cause of action as based upon an implied contract to repair. But if he took that view, it is difficult to understand why he went on to consider the question whether the six months allowed by the Act ran from the date of the testatrix's death or from the probate of her will—a question which, if the action was based on contract, was wholly immaterial. But whatever view Kay J. took of the nature of the action, when that case came before the Court of Appeal (5)

(1) (1600) 5 Rep. 13 a.
(2) (1805) 1 B. & P. (N.R.) 290.
(3) 5 Q. B. D. 404.
(4) 52 L. T. (N.S.) 41.
(5) 54 L. T. (N.S.) 105.

1898

BLACKMORE v. WHITE.

the doctrine of implied contract was expressly repudiated by all three members of the Court, and the ground upon which they proceeded was that the liability was an equitable liability arising out of the doctrine of trusts, and as that liability was enforceable only in a Court of Equity the statute of Will. 4, which deals only with actions of trespass and case, had no application. But there is no suggestion that the liability of the copyholder in the present case is equitable. It is not the law that wherever there is a duty there is an implied contract to perform it; for if there were the maxim Actio personalis moritur cum personâ would cease to have any application. The case of an action for ecclesiastical dilapidations, which survived against the executors at common law, is an anomalous exception to the ordinary rule. The plea of the general issue in an action of permissive waste is Not guilty. The duty of the copyholder to repair is one of imperfect obligation until it amounts to waste entitling the lord to presentment. The records of the manor shew that upon presentment the tenant is amerced; but the fact of amercement proves that neglect to repair is a wrong and not a breach of contract. [He also referred to *Powys* v. *Blagrave* (1), *Phillips* v. *Homfray* (2), and *Eastcourt* v. *Weekes*. (3)]

Foote, Q.C., in reply. The fact that indebitatus assumpsit lies for fines shews that the relation between the lord and the tenants is contractual. In Coke's Complete Copyholder, s. 57, it is said that permissive waste by the tenant is a cause of forfeiture ipso facto, and that presentment is not necessary. Probably the reason why there is no precedent for an action against a copyholder for neglect to repair is that so long as there was a right of renewal of the lease in perpetuity—and this was the general practice in all manors where tenements were leased for lives—the injury to the lord must have been purely nominal. It was not until that right of renewal was taken away in the case of ecclesiastical manors by the Ecclesiastical Leases Act, 1861 (24 & 25 Vict. c. 105), that the question could in practice arise.

Cur. adv. vult.

(1) (1854) 4 D. M. & G. 448. (2) (1883) 24 Ch. D. 439.
(3) (1699) 1 Salk. 186.

Dec. 15. LORD RUSSELL of KILLOWEN C.J., after stating the facts as above set out, proceeded as follows:—The first question with which I have to deal is whether, under the circumstances of this case, the lord of the manor could have maintained an action against Mary Southcott, the testatrix of the defendants, by reason of her neglect to repair the premises. It was a customary obligation incident to a tenancy of a copyhold tenement in this manor that the tenant should repair the tenement, and the answer to the question must depend upon the view taken as to the effect of that obligation. In my judgment, the true effect of the acceptance by the tenant of a tenancy to which that obligation was incident was that she impliedly contracted with the lord to keep the premises in proper repair. If this were a case, not of a copyhold tenant, but of a tenant of non-manorial land situate in a place where by the custom of the county or parish the tenant was bound to repair, the proposition that the acceptance of such a tenancy did not raise any implication of a contract by the tenant to repair as one of the terms of his tenancy would be unarguable. But it is said that a copyhold tenant, who is in theory merely a tenant at will holding according to the custom of the manor, stands upon a wholly different footing, and that from the acceptance of a copyhold tenancy no such contract is to be implied. It was contended, in the first place, that an action for a breach of duty to repair is an action for permissive waste, and that no action for permissive waste will lie against a tenant at will; and for that proposition reliance was placed upon the *Countess of Shrewsbury's Case*. (1) But when that case comes to be examined it will be seen that it does not support it. The head-note is: "An action on the case does not lie against tenant at will for permissive waste. But if tenant at will commits voluntary waste, it amounts to a determination of the will, and an action of trespass lies against him." But an examination of the case shews at once what the explanation of the decision is. There the Countess brought an action against one Crompton, to whom she had leased a house at will, for having during the tenancy suffered the house to be destroyed by fire.

(1) 5 Rep. 13 a.

1898

BLACKMORE v. WHITE.

Lord Russell C.J.

"It was adjudged that for this permissive waste no action lay, against the opinion of Brook in the abridgment of the case of 48 E. 3, 25, Wast. 52. And the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive, against lessee for life or years, because the lessee had interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should do no waste. So, and for the same reason a tenant at will shall not be punished for permissive waste." So that the decision is, not that an action for permissive waste will not lie against tenant at will under any circumstances, but that it will not lie in the absence of an express or implied contract to repair. The case of *Gibson* v. *Wells* (1) is to be explained in the same way. It was an action on the case against a tenant at will for permissive waste not alleging any contract express or implied, but suggesting that from the mere fact of the tenancy the obligation against permissive waste arose. Mansfield C.J. nonsuited the plaintiff, saying that he had never known an instance of such an action—that is, an action on the case—being maintained for permissive waste only. The other cases which were cited—*Powys* v. *Blagrave* (2), *In re Skingley* (3), and *Herne* v. *Bembow* (4)—are open to the same observations. Therefore, none of the cases which were cited are any authority for the proposition that a tenant at will of copyhold tenements who accepts his tenancy upon the terms that he shall keep the premises in repair will not be liable as for breach of contract if he neglects to keep them repaired. But it was said that even if the facts do raise an implication of a contract on the part of the tenant to repair, still the lord's remedy is not by action, but only by presentment followed by fine, and, if necessary, by forfeiture. There is, no doubt, this to be said in favour of that view—that, so far as the research of counsel and my own examination of the books has extended, there does not appear to be any reported case in which an action of this kind has been brought against a copyholder. The absence of precedent may

(1) 1 B. & P. (N.R.) 290.
(2) 4 D. M. & G. 448.
(3) (1851) 3 Mac. & G. 221.
(4) (1813) 4 Taunt. 764.

possibly be to some extent explained by the consideration that previously to the Act of 1861, by which the lords of ecclesiastical manors were prohibited for the future from leasing the tenements of the manors for lives in consideration of a fine, the question as to the liability of the tenant to the lord for allowing the tenement to get into a state of disrepair was one which was not likely often to arise. For the usual practice was, as here, to grant the premises to one or more persons for life in possession, and to grant to one or more other persons in reversion, and to make a further grant to a fresh life toties quoties as any grantee died. And under such circumstances it would always be to the interest of the grantee in reversion to see that the tenant in possession duly performed his obligation to repair, and did not by his neglect to do so injure the reversion. And this explanation would not in the ordinary course of things cease to have effect immediately after the passing of the Act of 1861, for by s. 2 it was provided that nothing in the Act contained should prejudice any present or future right of admission of any person to any copyhold tenement to which such person might be legally entitled. So that the question of the nature of the lord's remedy against his tenant for the breach of his duty to repair was not likely to arise until quite recent times. But it was contended for the defendants, not only that there was no precedent in favour of this action, but that the case of *Dench* v. *Bampton* (1) was an authority the other way, and shewed that the lord was confined to his remedy by forfeiture. There Lord Loughborough held that the lord of a manor is confined to his legal remedy for waste committed by a copyholder, and has no equity for an injunction and account. And in the course of his judgment (2) he says: "The lord can get no more than the forfeiture . . . . The law settles the matter between the lord and tenant. If by committing waste a forfeiture is incurred the lord proceeds for the forfeiture." That statement, however, cannot now be regarded as correctly expressing the law. In *Richards* v. *Noble* (3), in 1807, a bill by a lord against copyholders for an account of waste and for

(1) 4 Ves. 700.

(2) 4 Ves. at p. 707.

(3) 3 Mer. 673.

1898

BLACKMORE v. WHITE.

Lord Russell C.J.

an injunction was demurred to for want of equity upon the authority of *Dench* v. *Bampton*. (1) Lord Eldon overruled the demurrer, saying that "in many cases the forfeiture was a very inadequate remedy; and he noticed the instance of a barren spot upon which many valuable timber trees grow. If the copyhold tenant only forfeited his copyhold by cutting down these trees he might in such case be a considerable gainer by his own wrongful conduct." And in 1834, in *Parrott* v. *Palmer* (2), where also an injunction to restrain waste was claimed by a lord against tenants of the manor, Lord Brougham, while dismissing the injunction on the merits, said: "Not that by the nature of the question that relief is excluded; for the case of *Dench* v. *Bampton* (1) before Lord Loughborough is clearly not law; and independently of its having been overruled a few years afterwards in the case of *Richards* v. *Noble* (3), the principle on which Lord Loughborough proceeded has never been considered a sound one, namely, that the only remedy of the lord for waste done by the tenant in cutting timber without licence or custom is at law for the forfeiture." Then is there any other authority which throws any light upon this question? It seems to me that there is. There is clear authority for saying that an action will lie by the lord to recover a fine: 1 Cruise, Dig. 4th ed. p. 303; *Fraser* v. *Mason* (4); *Hayward* v. *Raw*. (5) But if an action will lie for a fine, why should it not equally lie for damages for neglect by the tenant of his duty to repair?

It was next contended that, even if an action would lie at all against a copyhold tenant for breach of his duty to repair, it was a condition precedent to the bringing of such an action that the homage should have presented the breach of the tenant's duty. But in my opinion that contention is unsound. Coke, in his Complete Copyholder, s. 57, speaking of "acts which amount to forfeiture," says, "some are forfeits eo instante that they are committed, some are not forfeits till presentment." And amongst those acts which belong to the

(1) 4 Ves. 700.
(2) 3 My. & K. 632.
(3) 3 Mer. 673.
(4) (1883) 11 Q. B. D. 574.
(5) (1861) 6 H. & N. 308.

former class he places waste. "If a copyholder committeth waste voluntary or permissive, this is a forfeiture ipso facto. . . . Permissive; as if he suffereth his house to decay or fall to the ground for want of necessary reparations; . . . . these and the like permissive wastes are forfeitures ipso facto." But if presentment is not a condition precedent to a forfeiture for neglect to repair, neither does there seem to be any reason why it should be a necessary preliminary to the bringing of any action for damages for such neglect.

A further point was made that if an action would lie in this case the person entitled to sue for the breach of duty was not the lord, but the reversioner, C. W. Bartholomew, he being, it was said, the person who was really injured by the breach. What the effect upon the lord's right of action would have been if there had been interposed between him and the tenant for life a real reversioner, it is not necessary here to discuss—though I should have thought that even in that event the lord would have had a cause of action for nominal damages—for here there was in fact no real reversioner interposed between them. Upon the death of the defendants' testatrix, the grantee in reversion, C. W. Bartholomew, had his attention called to the fact of the death and of his right to possession; but he disclaimed and declined to be admitted, and never was in fact admitted, and his rights and obligations would, as appears from the case of *Hayward* v. *Raw* (1), depend wholly upon the fact of his admission. The result, therefore, was that the immediate right to the possession of the premises reverted to the lord, and he consequently was the only person injured by the testatrix's neglect, and he alone was entitled to sue.

The last contention raised by the defendants was that even if an action would have lain by the lord against their testatrix in her lifetime, it was in the nature of an action of tort, and did not on her death survive against her executors at common law, and for that proposition the case of *Woodhouse* v. *Walker* (2) was relied upon. There a devise of premises for life provided that the tenant for life should keep them in repair. The tenant for life entered and enjoyed the premises during her life, but

(1) 6 H. & N. 308.

(2) 5 Q. B. D. 404.

1898

BLACKMORE v. WHITE.

Lord Russell C.J.

left them at her death out of repair. The remainderman in fee having brought an action against the executor of the tenant for life within the six months prescribed by 3 & 4 Will. 4, c. 42, s. 2, it was held by Lush and Field JJ. that an action of tort in respect of the permissive waste would have lain against the tenant for life at common law, and consequently lay under the statute against her executor after her death. They treated the case as one of tort, and apparently would have held that, but for the statute, the action would not have lain. I am of opinion, however, that the more correct view of the nature of the action in such cases is that which was taken by Kay J. in the later case of *Re Williames, Andrew* v. *Williames*. (1) There the facts were similar to those in the last case, and Kay J. held that there was a liability on the part of the deceased tenant for life for omission to repair the premises, as for a breach of a condition or implied contract, and the remedy for that breach of contract survived against the executor. His decision was affirmed in the Court of Appeal. But if the liability of a tenant for life taking as devisee under a will is a liability in contract, a fortiori must the liability of a copyholder who takes under a grant from the lord be a contractual liability. And if so, the remedy to enforce that liability does not die with the person. I need only further refer to the general proposition of law laid down in Williams on Executors, 9th ed. 1593: "The general rule has been established from very early times with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death and is enforceable against his executor or administrator." I think the present case falls within that rule.

Judgment for the plaintiff.

Solicitors for plaintiff: *Sparkes, Pope & Thomas.*
Solicitors for defendants: *Coode, Kingdon & Cotton.*

(1) 52 L. T. (N.S.) 41.

J. F. C.

In re GAMBLE.

1898
Dec. 16.

Poor Law—Sum Due under Maintenance Order—Recoverable as a Civil Debt—The Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 6—*Summary Jurisdiction Act*, 1879 (42 *& 43 Vict. c.* 49), *ss.* 6, 35.

Money due under an order of justices made upon a person for the maintenance of his father under 43 Eliz. c. 2, s. 6, is recoverable before a court of summary jurisdiction as a civil debt and not as a penalty; and an order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress, unless it be proved that the person in default has since the date of the latter order had the means to pay the sum in respect of which he has made default.

RULE for a writ of habeas corpus.

On July 8, 1897, an order of justices was made ordering the applicant, George Gamble, to pay to the guardians of the Upton-on-Severn Union weekly the sum of 1*s.* 6*d.* towards the maintenance of Richard Gamble, the father of the applicant so long as Richard Gamble should remain chargeable to the common fund of the union. On October 22, 1898, there was due and owing from the applicant to the guardians under the said order the sum of 1*l.* 8*s.*, and complaint was on that date made before the justices that the applicant had neglected to pay that sum. The justices, on October 27, ordered the applicant to pay the money on or before November 10, and that in default of payment by that date he should be imprisoned for fourteen days unless the money should be sooner paid. The fourteen days expired without the applicant paying any part of the money due; and thereupon, on November 18, a warrant was issued for the arrest of the applicant, and he was, on December 5, imprisoned accordingly in Worcester Gaol. There was no inquiry as to whether he had at any time subsequent to the making of the order of October 27 the means to pay the money due from him. A rule was obtained on behalf of the applicant calling on the governor of the gaol and the guardians of the union to shew cause why a writ of habeas corpus should not issue.

1898

GAMBLE, *In re.*

Leslie, on behalf of the guardians, shewed cause. The justices had power to commit the applicant to prison for non-compliance with their order of October 27. If he had the means to pay the money at the time when it became due under the order of July 8, 1897—and there was no suggestion that he had not—his non-payment of it at that date was in the nature of a criminal offence, and it was immaterial whether he had the means to pay at the time of the subsequent order of October 27. The statute of Elizabeth (43 Eliz. c. 2, s. 7), by which "the children of every . . . . poor person not able to work" were required, "being of a sufficient ability" to maintain their poor parents to the extent assessed by the justices, enforced the performance of that duty by a penalty of twenty shillings. By s. 36 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), so much of the Act of Elizabeth as prescribed the penalties for disobedience of a maintenance order was repealed, and it was provided that maintenance orders should be enforced in the manner prescribed by Jervis's Act (11 & 12 Vict. c. 43) for enforcing orders of justices. The abolition of the penalty did not, however, deprive of its criminal character the neglect for which the penalty was originally imposed. Jervis's Act provided two modes of procedure, one for the purpose of obtaining an order for the payment of money and commencing with complaint, and the other for the purpose of obtaining a conviction and commencing by information. But even under the procedure which commenced by complaint there was power under Jervis's Act to commit the defendant to prison in default of distress. Down to 1879, then, the person liable under a maintenance order, whether such an order is to be regarded as civil or criminal, might be sent to prison for non-payment. Under the Summary Jurisdiction Act, 1879, s. 6, a sum recoverable on complaint and not on information is deemed to be a civil debt, and by s. 35 an order for the payment of a civil debt is not to be enforced by imprisonment unless the defendant has since the date of the order had the means to pay. Therefore, since that Act liability to imprisonment for non-payment of money due under an order of justices depends upon whether that money is to be regarded as a civil debt or as a criminal

penalty. [He referred to *Reg.* v. *Paget* (1) and *Reg.* v. *Kerswill.* (2)]

Sir R. Webster, A.-G., and *H. Sutton*, in support of the rule. Money due under a maintenance order is at the present day a purely civil debt, and its recovery is the subject only of a complaint and not of an information. It is only because it has been the common practice in many parts of the country to enforce these orders by imprisonment that it is desired to have an authoritative decision that such mode of enforcement is illegal.

WILLS J. I am clearly of opinion that this rule must be made absolute. It seems that down to 1868 where a person neglected to obey an order of justices ordering him to contribute to the maintenance of his parent he was liable to a penalty, and a penalty necessarily implies that the act or omission in respect of which it is imposed is in the nature of a crime. For the omission to pay the money ordered there was therefore jurisdiction to commit the defaulter to prison. Then, by s. 36 of the Poor Law Amendment Act, 1868, the penalties imposed by s. 7 of the Act of Elizabeth were repealed, and orders for the payment of money due under a maintenance order were to be enforced in the manner prescribed by Jervis's Act for the enforcing of orders of justices. It was suggested that as Jervis's Act applied both to informations—the procedure by which persons charged with crimes were brought before the Court—and to complaints—the procedure applicable to a failure to perform some civil obligation—it was left in doubt under which category the neglect to obey a maintenance order should be classed. But, even if the Legislature stood there, I do not think that there would be any reasonable doubt about the matter. For the moment that the penalties were gone there was nothing left to stamp the failure to pay the money with the character of a crime. It was the artificial attachment of a penalty by the statute of Elizabeth that alone gave the neglect its criminal character. Then the Summary Jurisdiction Act of 1879 seems

(1) (1881) 8 Q. B. D. 151. (2) [1895] 1 Q. B. 1.

1898

GAMBLE, *In re.*

Wills J.

to put the matter beyond all doubt. For it provides by s. 6 that "where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise." When the Legislature there speaks of money recoverable on complaint and not on information, it means money for the recovery of which a complaint as distinguished from an information is the proper procedure, and, as was pointed out in *Reg.* v. *Kerswill* (1), the words "and not on information" were probably inserted only "to emphasize the exclusion of criminal matters from the operation of s. 6." The only object of either an information or a complaint is to bring the defendant before the Court, and when once he is there it does not matter in the least what the process by which he was got there was called: the question whether the money which he is called upon to pay is recoverable on complaint or on information must in each case depend upon the substance of the thing. Then, if the money due from the applicant in this case is a civil debt, the mode of its recovery is pointed out by s. 35, by sub-s. 2 of which it is provided that "An order made by a court of summary jurisdiction for the payment of any such civil debt . . . . shall not, in default of distress or otherwise, be enforced by imprisonment, unless it be proved . . . . that the person making default in payment of such civil debt . . . . either has or has had since the date of the order the means to pay the sum in respect of which he has made default." There has been no inquiry into the applicant's means in this case; therefore his commitment to prison cannot be supported, and the rule must be made absolute.

BRUCE J. I am of the same opinion. I think that there was no jurisdiction to send the man to prison unless the

(1) [1895] 1 Q. B. at p. 8.

justices were satisfied that he had means to pay since the date of the order of October 27.

1898

GAMBLE, *In re.*

Rule absolute.

Solicitors for guardians: *Foyer & Hordern, for G. Powell, Upton-on-Severn.*

Solicitor for applicant: *Solicitor to the Treasury.*

J. F. C.

MALLET *v.* GREAT EASTERN RAILWAY COMPANY.

1899 *Jan.* 11.

Railway Company—Contract of Carriage—Owner's Risk Note—Construction.

The plaintiff delivered to the defendants, a railway company, goods to be carried to their destination viâ a particular route, upon the terms that the plaintiff, in consideration of his being charged a reduced rate below the defendants' ordinary rate, relieved the defendants "from all liability for (inter alia) delay . . . . except upon proof that such . . . . delay . . . . arose from wilful misconduct on the part of the servants of the company." The defendants by mistake forwarded the goods by a different route from that contracted for, in consequence whereof the arrival at their destination was delayed and the plaintiff suffered damage.

Held, that as the delay of the goods was not a delay in the performance by the defendants of their contract, they were not relieved from responsibility.

APPEAL from county court of Norfolk.

The plaintiff delivered to the defendants at Lowestoft certain parcels of fish to be forwarded to Jersey viâ the Great Western Railway and Weymouth, upon the terms of a consignment note signed by the plaintiff which stated that the fish was "to be carried at the reduced rate below the company's ordinary rate in consideration whereof I agree to relieve the Great Eastern Railway Company . . . . from all liability for loss damage misdelivery delay or detention except upon proof that such loss damage misdelivery delay or detention arose from wilful misconduct on the part of the servants of the company." Goods sent from Lowestoft to Jersey have to pass through London, from which point to Jersey there are two routes—one by the Great Western Railway and Weymouth, the other by the London and South Western Railway and

1899

MALLET v. GREAT EASTERN RAILWAY.

Southampton. The steamers by the two routes were timed to arrive about the same time; but the Southampton route is the longer sea journey, and, the weather being at that date rough, the plaintiff selected the Weymouth route on the ground that delivery of goods carried by it would not be exposed to the same risk of delay. It was of importance to the plaintiff to send the goods by the quickest steamer as the fish market in Jersey is held as soon as the first steamer arrives. The direction that the plaintiff's fish was to be sent by the Weymouth route, which was filled in by the plaintiff, was not very distinctly written, and the defendants' servants by mistake sent it by the Southampton route. The result was that the fish arrived at Jersey too late for the market for which it was intended, and the consignee refused to accept delivery. The plaintiff sued the defendants in the county court to recover the amount of the loss sustained. The judge held that the defendants' act in sending the fish by the wrong route did not amount to wilful misconduct, and that they were protected by the terms of the consignment note from liability for the delay. The plaintiff appealed.

E. Wild, for the plaintiff. The delay in the delivery of the fish at Jersey was not a "delay" within the meaning of the consignment note, and therefore not one in respect of which the defendants are protected. The delay for which they are excused in the absence of wilful misconduct is a delay in the performance of their contract, but the delay here arose in the course of the performance of a substituted contract to which the plaintiff never agreed. In *Sleat* v. *Fagg* (1) a parcel of bank notes of the value of 1300*l.* was delivered to a carrier to be carried by a mail coach. The carrier sent it by a different coach and it was lost. The carrier had previously given notice that he would not be answerable for any parcel above 5*l.* in value unless an insurance was paid. No insurance having been paid, it was held that, notwithstanding that fact, the carrier was liable, on the ground that it was "not mere neglect in the course of performing the contract, but an absolute

(1) (1822) 5 B. & A. 342.

refusal by the defendant to execute the engagement entered into by him." That case is on all fours with the present.

Bodilly, for the defendants. The "delay" for which the defendants are excused is a delay arising either in the performance or the intended performance of the contract. The evidence shewed that the fish was sent by the wrong route by a mistake, caused partly by the indistinctness of the plaintiff's writing, and partly by the negligence of the defendants' servants. The defendants, in sending the fish by that route, intended to perform what they supposed their contract to be. The distinction between this case and that of *Sleat* v. *Fagg* (1), is that there it was present to the mind of the carrier that in sending the parcel by the wrong coach he was not performing his contract, for the evidence showed that the carrier had made a practice of sending by light coach all parcels arriving at the office before a certain hour although directed to go by the mail. Then if the delay here was a delay within the meaning of the contract the defendants are protected, for that delay did not arise from wilful misconduct. To bring a case within that exception it is not enough that the defendants' conduct should be wilful: what is required to be wilful is their misconduct; in other words, they must, at the time of doing the act complained of, be conscious that they are doing wrong. *Lewis* v. *Great Western Ry. Co.* (2)

Wild, in reply.

DAY J. I entertain no doubt whatever as to the rights of the parties in this case. The defendants entered into a contract with the plaintiff to send his goods by the Great Western Railway and Weymouth. Without his consent they altered the contract and sent the goods by a different route. In consequence of their being sent by this substituted route there was a delay in the delivery. The defendants contend that they are protected from liability for that delay by the terms of the consignment note. But I am of opinion that that is not so. The delay referred to in the consignment note is a delay in the performance of the contract. But that is not this case.

(1) 5 B. & A. 342. (2) (1877) 3 Q. B. D. 195.

1899

MALLET v. GREAT EASTERN RAILWAY.

Here the delay arose in consequence of the defendants doing something which was wholly at variance with the contract. The county court judge was wrong, and the appeal must be allowed.

LAWRANCE J. I agree.

Appeal allowed.

Solicitors for plaintiff: *Dubois & Williamson, for Chamberlain, Great Yarmouth.*

Solicitor for defendants: *E. Moore.*

J. F. C.

C. A.

1898

Dec. 1, 19.

[IN THE COURT OF APPEAL.]

GREENWOOD AND ANOTHER *v.* FRANCIS.

Principal and Surety—Co-Sureties—Giving Time to Debtor—Contribution.

The plaintiffs and the defendant, who were directors of a company, gave their joint and several bond for the purpose of guaranteeing repayment of a loan which the company raised upon mortgage of its premises, and it was provided by the bond that, although as between the company and the obligors, the latter were only sureties for the company, nevertheless, as between the obligors and the obligees (the lenders of the money), the former should be taken to be principal debtors, so that they should not nor should either of them be released from their or his liability by reason of time being given to the company or their assigns, or by any other forbearance, act, or omission of the obligees or their assigns, or by any other matter or thing whereby the obligors, or either of them, would be so released but for this provision. The plaintiffs having had to pay the amount secured by the bond, the mortgage was transferred and the bond assigned to them: and they brought an action against the defendant for contribution and as assignees of the bond to recover a third part of the amount which they had paid. The plaintiffs having, without the defendant's assent, entered into an agreement with a new company, who became the purchasers of the goodwill, premises, and stock-in-trade of the first-mentioned company, that they would not for a certain period of time enforce the mortgage against the new company:—

Held, that, having regard to the provisions of the bond, this agreement did not afford a defence to the action brought by the plaintiffs against the defendant.

Query, whether an agreement by a surety to give time to the principal debtor discharges a co-surety.

APPEAL from the judgment of Day J. in an action tried by him without a jury.

Three obligors had executed a bond as a security for repayment of a loan made to a company of which they were directors. The action was brought by two of them against the third for contribution. The plaintiffs also sued as assignees of the bond. The learned judge gave judgment for the plaintiffs.

The following statement of the facts is taken from the judgment of A. L. Smith L.J.

In the month of February, 1897, the Victoria Mansions Restaurant Company, Limited, of which company the plaintiffs and the defendant were directors, was desirous of raising a loan upon second mortgage of its premises, there being at the time a first mortgage thereon of 12,000*l*. Ind, Coope & Co. were willing to make an advance of 5500*l*. provided the company would give a second mortgage for that amount and that the three directors, the two plaintiffs and the defendant, would jointly and severally guarantee the repayment upon July 5, 1897, to them by the Restaurant Company of the sum of 5000*l*., being part of the proposed loan, with interest at 5 per cent. thereon. Accordingly, upon February 6, 1897, this second mortgage was given by the Restaurant Company to Ind, Coope & Co., and a joint and several bond of the plaintiffs and defendant was also given by them to Messrs. Ind, Coope & Co. to further secure the repayment of their loan, and by this bond it was expressly agreed and declared that, although as between the Restaurant Company and the three obligors the latter were only sureties for the Restaurant Company, nevertheless as between the three obligors and Ind, Coope & Co., the former should be taken to be principal debtors for all moneys intended to be thereby secured, so that they should not, nor should either of them, be released from their or his liability under the bond by reason of time being given to the Restaurant Company or their assigns, or by reason of any collateral securities for moneys intended to be thereby secured, or by any other forbearance, act, or omission of Ind, Coope & Co., Limited, or their assigns, or by any other matter or thing, whereby the three obligors, or either of them, would be so released but for this provision. This bond having been thus given, matters rested

C. A. 1898

GREENWOOD v. FRANCIS.

until the month of July in that year. By this time the Restaurant Company was in difficulties, and upon July 17, 1897, a resolution was passed to voluntarily wind up the company, the defendant, Captain Francis, being in the chair upon that occasion; and upon August 9, 1897, a supervision order was made by Byrne J. At this date Ind, Coope & Co. were pressing for repayment of their loan, and had instructed their solicitors to commence an action against Messrs. Greenwood, de la Fontaine, and Francis for the recovery of the 5000*l.* and interest guaranteed by them unless they (Ind, Coope & Co.) received payment of their open account, which then amounted to about 1000*l.* That the position of the Restaurant Company was at this time critical, as was also the position of the three obligors of the bond, no one can doubt, and what next happened was this. The Restaurant Company, Limited (which I shall hereafter call the old company), by its liquidator, on August 24, 1897, entered into a contract with a Mr. Carter for and on behalf of an intended company (which I shall call the new company), whereby it was contracted that the old company should sell to the new company its goodwill, lease, and benefit of contracts for the sum of 2000*l.*, and also its stock-in-trade for a sum not exceeding 1200*l.*, subject to the two mortgages of 12,000*l.* and 5500*l.* respectively. By this contract it was agreed between the old company, through its liquidator, and Mr. Carter, for the intended new company, that before the date of the completion of the purchase the old company should pay off and obtain a transfer to Messrs. Greenwood, de la Fontaine, and Francis, directors of the old company, or some of them, of Ind, Coope & Co.'s second mortgage, and should also obtain an agreement by such directors with the new company that they would not require the payment of the principal moneys due upon the second mortgage for the space of twelve months from the date of completion. It appears to me upon the evidence that this contract of August 24, 1897, was a contract made between the old company, through its liquidator, and Mr. Carter, on behalf of the new company, and was not a contract made by Mr. Greenwood and Mr. de la Fontaine, as suggested by Mr. Neville for Captain Francis when he opened the appeal. This contract

did not bind Mr. Greenwood nor Mr. de la Fontaine unless they afterwards should agree to be so bound. The evidence shews that the only agreement Mr. Greenwood entered into was a subsequent agreement of September 29, 1897, with the new company, and there is evidence that Mr. de la Fontaine concurred in this last agreement. Captain Francis undoubtedly did not agree thereto, for he was of opinion that, as Messrs. Greenwood and de la Fontaine were simple contract creditors of the old company, which he (Captain Francis) was not, they would obtain an advantage over him by participating in any balance there might be left in the hands of the liquidator of the 2000*l.* paid by the new company after payment thereout of the overriding charges due by the old company, and he desired that Mr. Greenwood and Mr. de la Fontaine should pool what they might receive thereout so that he (Captain Francis) might participate therein, and this Messrs. Greenwood and de la Fontaine refused to do. What Mr. Greenwood did agree to, and the evidence shews that Mr. de la Fontaine concurred therein, was as follows. The agreement is in writing, and is addressed to "The New Victoria Mansions Restaurant Company, Limited, and Mr. F. H. Carter," and is dated September 29, 1897. It runs thus: "Gentlemen,—On completion of the purchase this day of the lease, goodwill, &c., of the Victoria Mansions Restaurant, Limited, I have seen the contract dated August 24, 1897, as entered into by the liquidator with Mr. Carter, and in consideration of your consenting to allow the completion to proceed before the transfer of the Ind, Coope mortgage as agreed has actually taken place, I hereby undertake with you and each of you that the transfer of the said mortgage to Messrs. Ind, Coope & Co. shall be carried out within one calendar month from this date and Messrs. Ind, Coope & Co. discharged. Also, I agree that the said mortgage when so transferred shall not be enforced or the mortgage money called in before the expiry of six calendar months from the date of such transfer, and I hereby keep you and each of you indemnified against any enforcement of the said mortgage by Messrs. Ind, Coope & Co. until such transfer, saving as to the covenant that spirits, &c., be purchased from them.—

C. A. 1898

GREENWOOD v. FRANCIS.

Hubert J. Greenwood." Besides the payment of 2000*l.* to the liquidator of the old company by the new company, a further condition upon which the new company became purchaser was that it should undertake to reduce the amount due upon the first mortgage by 1000*l.*, which was done. Upon October 18, 1897, Mr. Greenwood and Mr. de la Fontaine were called upon to pay to Ind, Coope & Co. the 5000*l.* and interest due under their bond of guarantee, and they did so, and by deed of that date made between Ind, Coope & Co., the new company, Mr. Greenwood, and Mr. de la Fontaine, Ind, Coope & Co. transferred to Messrs. Greenwood and de la Fontaine the second mortgage for 5500*l.*, and the new company therein covenanted with Messrs. Greenwood and de la Fontaine to pay to them the principal sum of 5500*l.* on January 5, 1898, together with the sum of 135*l.* 7*s.* 4*d.*, and by this deed it is expressly provided that "nothing herein contained shall be deemed or construed to release, or give any time or indulgence to the old company or Captain Francis, or prejudice any right or remedy of the transferees Greenwood and de la Fontaine against them or either of them, or against the mortgaged premises, the covenant by the new company being intended as an additional security only for the mortgage debt and interest." On the same day, October 18, 1897, Ind, Coope & Co. assigned and transferred to Mr. Greenwood and Mr. de la Fontaine the principal sum of 5000*l.* secured by the bond of February 6, 1897, and the said bond, and the full benefit and advantage thereof.

Neville, Q.C., and *Herbert Reed, Q.C.* (*Montague Lush* with them), for the defendant. The agreement of September 29, 1897, operated to discharge the defendant from liability to contribution. An agreement by a co-surety to give time to the principal debtor comes within the same principle as an agreement by the creditor to give time to the principal debtor, and therefore discharges another co-surety from liability to contribution, just as such an agreement by the creditor discharges a surety: *Polak* v. *Everett*. (1) A co-surety who has paid the debt stands

(1) (1876) 1 Q. B. D. 669.

in the shoes of the original creditor for this purpose. An agreement whereby one co-surety, without the consent of the other, contracts not to enforce a security for the debt for a certain time stands on the same footing as an agreement to give time, and therefore discharges the other co-surety. The agreement by which the plaintiffs in this case agreed not to enforce the mortgage or call in the mortgage money as against the new company, who were the assigns of the old company, and became the principal debtors, for six months, had the same effect as such an agreement with the old company would have had. It was by implication part of the bargain under which the defendant became co-surety with the plaintiffs for the moneys advanced by Ind, Coope & Co. that the co-sureties should have the benefit of the security given by the second mortgage, and that on payment by them of the amount guaranteed they should be entitled at once to realize that security. It has been held that a surety is bound to bring into hotchpot for the benefit of his co-surety any security he may have taken for the amount guaranteed: *Steel* v. *Dixon*. (1) The plaintiffs, by agreeing to give time before realizing the mortgage security, have altered the position of the defendant as co-surety, and the defendant is therefore released from his obligation to contribute. The true nature of the transaction as between the plaintiffs and the defendant was that they would equally bear any deficiency that might arise on the realization of the mortgage security. If the plaintiffs, without the assent of the defendant, agree to take the risk of deferring the realization of the security for six months, and so disable themselves for that time from enforcing it, they contravene the terms of the bargain, and thereby discharge the defendant: *Taylor* v. *Bank of New South Wales*. (2)

[They also cited *Clarke* v. *Birley* (3); *Pledge* v. *Buss*. (4)]

Mattinson, *Q.C.*, and *G. Cave* (*Firminger* with them), for the plaintiffs. There was no agreement to give time to the principal debtors, the old company. The agreement to postpone the enforcement of the mortgage was with the new company.

(1) (1881) 17 Ch. D. 825.
(2) (1886) 11 App. Cas. 596.
(3) (1889) 41 Ch. D. 422.
(4) (1860) Joh. 663.

C. A. 1898

GREENWOOD v. FRANCIS.

The deed of October 18, 1897, expressly provided that nothing therein should operate to give time to the old company. The doctrine by which an agreement to give time by the creditor releases the surety does not apply as between co-sureties. As between themselves co-sureties are principals, and the only obligation incumbent on them inter se is to act reasonably with regard to the realization of any security there may be, and not to waste it. The evidence shews that the arrangement made by the plaintiffs with the new company with regard to the mortgage was under the circumstances the best that could be made in the interests of all parties. Even if a surety wastes a security for the debt, it does not discharge a co-surety altogether, but only pro tanto. Moreover, in the present case, by the express terms of the bond, it is provided that no giving of time or other forbearance, or any other act done by the obligees, shall discharge the obligors or either of them; and the plaintiffs, having paid off the debt and taken an assignment of the bond, stand in the shoes of the obligees.

[They cited *Pearl* v. *Deacon* (1); *Wulff* v. *Jay* (2); *Margretts* v. *Gregory* (3); *In re Parker* (4); *Holme* v. *Brunskill* (5); *Deering* v. *Winchelsea*. (6)]

Herbert Reed, Q.C., in reply. The provision in the bond upon which the plaintiffs rely is one inserted for the benefit of the original creditors, and can hardly be meant to apply as between co-sureties. If it were applicable to them, as suggested, it would appear to cover an absolute release of the security by one co-surety, which surely cannot be the effect of it. The provision only relates to acts of the obligees whereby the personal liability of the principal debtors may be affected, and provides that such acts shall not have the effect of releasing the sureties. It has nothing to do with securities for the debt and the rights of co-sureties inter se in respect of them. It is contended that the effect of the evidence is to shew that the arrangement made by the plaintiffs with the new company was

(1) (1857) 24 Beav. 186; 1 De G. & J. 461.
(2) (1872) L. R. 7 Q. B. 756.
(3) (1862) 10 W. R. 630.
(4) [1894] 3 Ch. 400.
(5) (1877) 3 Q. B. D. 495.
(6) (1800) 2 B. & P. 270.

made in their own interest, as being interested in the success of the company, and not in that of the defendant. (1)

Cur. adv. vult.

Dec. 19. A. L. SMITH L.J. read the following judgment:—This is an action by the plaintiffs, Mr. Greenwood and Mr. de la Fontaine, to recover from the defendant, Captain Francis, a third part of the sum of 5000*l.* and interest thereon, which the three had jointly and severally guaranteed to the firm of Ind, Coope & Co., Limited, and which sum the plaintiffs have had to pay to that firm.

[The Lord Justice then stated the facts as above, and proceeded as follows:—]

Before I deal with the law applicable to this case, I will say that I do not doubt that what was done by the liquidator, by Mr. Greenwood, and by Mr. de la Fontaine was in the best interest of all concerned, and, in my judgment, Day J. was well warranted in finding, as he did, that this was so, and the evidence as to this is all one way. Mr. Greenwood and Mr. de la Fontaine, having paid to Ind, Coope & Co. the 5000*l.* and interest covered by the joint and several bond of themselves and Captain Francis, now ask Captain Francis to pay to them his share of the loss thus sustained—that is, one-third of the 5000*l.* and interest so paid; and what is his answer? Now, as to the law, Captain Francis first of all says that he and the plaintiffs were co-sureties together to secure to Ind, Coope & Co. repayment by the old company of the 5000*l.* and interest advanced to it by them, and that by a binding contract time has been given to the principal debtor for the payment off of this 5000*l.* and interest, and that he is thereby released from the payment of the one-third of this 5000*l.* and interest; and this is how the case is first presented to us, which certainly requires investigation. Now, assuming

(1) The above is only a very brief sketch of the arguments. It is not thought necessary to set out the arguments more fully, because, as will be seen, the judgment did not decide the broader questions raised, but turned on a narrower ground, namely, the effect of the special provision in the bond above mentioned.

C. A. 1898

GREENWOOD v. FRANCIS.

A. L. Smith L.J.

that this had been a case of a principal creditor suing a surety upon default made by the principal debtor, by whom and to whom must time by binding contract be given so as to discharge the surety? It is obvious that it must be by the principal creditor to the principal debtor, for who apart from the principal creditor could make such a contract? The principles upon which a binding contract to give time by the principal creditor to the principal debtor without the consent of the surety discharges the surety are familiar to all lawyers, but as to this I will read the well-known passage in the judgment of Blackburn J. in *Polak* v. *Everett*. (1) That learned judge says: "It has been established for a very long time, beginning with *Rees* v. *Berrington* (2) to the present day, without a single case going to the contrary, that, on the principles of equity, a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship—namely, to use the name of the creditor to sue the principal debtor—and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether." I have never before heard of defences which would be defences by a surety against a principal creditor being attempted to be set up in a case of sureties suing a co-surety for contribution, and no authority has been cited to shew that this can be done. What principles of equity are there to intervene to prevent one surety suing his co-surety at law to indemnify him from that part of the loss which the latter was bound to participate in and which the former has been compelled to pay? What defences a surety has against his co-surety when sued for contribution are no more and no less than the defences one principal may have against another principal, and this alone would, I think, suffice to determine this case against Captain Francis apart from points made by his learned counsel which I must deal with. It cannot be said upon the facts of this case that

(1) 1 Q. B. D. 669, at pp. 673, 674. (2) (1795) 2 Ves. 540.

Ind, Coope & Co., the principal creditors, have given time to the old company, the principal debtors. Then how do the principles of equity relating to the discharge of a surety by the giving of time arise? It is said that Mr. Greenwood and Mr. de la Fontaine were assignees of Ind, Coope & Co., and that, though sureties, they thus became the principal creditors and had given time by the agreement of September 29, 1897, to the assignees of the old company—that is, to the new company—who had thus become the principal debtors. Whether this suggestion is well founded or not I do not stop to discuss nor to decide, for it is not necessary to do so, for there is this clear answer to it. By the bond under which Mr. Greenwood, Mr. de la Fontaine, and Captain Francis became, as Captain Francis says, sureties, though in reality they became principals between themselves, Ind, Coope & Co. were expressly empowered by Captain Francis, as well as by his co-obligors, to give time to the old company, and, if Mr. Greenwood and Mr. de la Fontaine are to be taken as being assignees of Ind, Coope & Co., and thus had become principal creditors, they would have the same rights as Ind, Coope & Co., one of which was to give time to the old company, and this is what Captain Francis himself, under his own hand and seal, has agreed might be done without affecting his liability under the bond to either Ind, Coope & Co. or their assigns. Again, if it be said that the new company is assignee of the old company, still, if giving time to the new company is giving time to the old company, which I do not decide, the observations I have above made about the giving of time in this case being expressly permitted by the bond without discharging the surety apply. Again, to meet a further suggestion of counsel for Captain Francis, I agree that, if this had been an action by a principal creditor against a surety, and the surety could have shewn that the contract of the surety with the principal creditor without his assent had been altered by the principal creditor, that would have wholly discharged the surety in such an action upon the plain ground, as Lord Watson tersely puts it in *Taylor* v. *Bank of New South Wales* (1), that the surety could not be made liable for default

(1) 11 App. Cas. 596, at p. 603.

C. A. 1898

GREENWOOD v. FRANCIS.

A. L. Smith L.J.

in the performance of a contract which he had not guaranteed. But this defence has no application to a case where one surety is suing another for contribution, the one having been compelled to pay the whole amount guaranteed to the principal creditor. One last word. It is said for Captain Francis that the plaintiffs have wasted his security. In my opinion, this is not established in fact; and, if it had been, it would only have given Captain Francis, as one principal against another principal, a right to recover what damages he could establish he had sustained by the wrongful act of the other; it gives him no right to be released in toto from contributing the one-third of the 5000*l.*, which is the defence he sets up in this action. In my judgment, Captain Francis's defences entirely fail. The appeal must be dismissed, with costs.

RIGBY L.J. read the following judgment:—The plaintiffs in this case, being sureties for the debt to Ind, Coope & Co., Limited, secured by the bond of themselves and the defendant, their co-surety, have paid that debt, and upon such payment became entitled to and have actually had executed to them an assignment of the bond. This assignment, whether the bond debt is or is not to be deemed at law to have been satisfied by the payment of the debt, entitles them to stand in the place of Ind, Coope & Co., and to use all their remedies in order to obtain from their co-surety, the defendant, indemnification for the advance made by them. It is not now necessary to use the name of Ind, Coope & Co., but the remedies in this action are those of Ind, Coope & Co., subject to the proviso that the plaintiffs are not entitled to recover from the defendant more than the just proportion—in this case one-third of the whole debt paid with interest and expenses—to which, as between the plaintiffs and defendant, the defendant is liable: see the Mercantile Law Amendment Act, 1856, s. 5. Now under the bond Ind, Coope & Co. were entitled to treat the plaintiffs and defendant as principal debtors. The right of action is, therefore, independent of any questions which might otherwise arise between Ind, Coope & Co. as principal creditors and the plaintiffs and defendant as sureties. There might, of course,

be a counter-claim for any loss actually occasioned to the defendant by any wrongful action of the plaintiffs. The only ground upon which such a claim could be based would be that the plaintiffs have wrongfully depreciated their mortgage security so as to injure the defendant. This being so, I do not think it necessary to go into the other questions raised in the action beyond saying that I am of opinion that it is not established by the defendant that the plaintiffs by their dealing with the mortgage security have in any way depreciated the value of that security so as to give the defendant a right of action against them. I think, indeed, that they took a reasonable and proper course with reference to the mortgage security.

COLLINS L.J. read the following judgment:—The plaintiffs in this case are suing their co-surety on a claim for contribution of his share of the sum which they have paid to the creditor in satisfaction of the guaranteed debt. They are also suing as assignees of the creditor on the bond by which they and the defendant became co-sureties for the old company, the principal debtor. This is not a case where the sureties acting together have agreed to pay off the creditor and take an assignment of his securities for the common benefit. The action of the plaintiffs was taken in their own interest and against the protest of the defendant; and in view of this fact I think that questions of some nicety might have arisen when their rights as assignees of the creditor on the contract of guarantee came to be considered but for the fact that that instrument constitutes the co-sureties in all respects principal debtors as between themselves and the creditor, and debars them from relying on defences, such as giving time to the principal debtor, &c., which in ordinary cases might suffice to discharge a surety. It is unnecessary to consider, therefore, whether they in fact placed themselves in such a relation towards their co-surety as to enable him to set up against them acts which, if done by the principal creditor under an ordinary contract, might have released the surety; nor whether, if they did stand in such relation, their dealings with the two companies, the old and the new, were such as to amount to a giving of time to the

C. A. 1898

GREENWOOD v. FRANCIS.

Collins L.J.

principal debtor or variation of the terms of the guaranteed contract such as might discharge a surety; nor whether, if a defence on such grounds would have defeated their claim as assignees of the bond, they nevertheless could have set up their claim for contribution. None of these points arise for determination, and I desire to give no opinion upon any of them. When these matters are eliminated their rights are to be determined simply in view of the fact that they are liable to contribute equally to the discharge of the obligation assumed, and are all equally entitled to the benefit of any securities held for the same. There cannot, therefore, I think, be any higher duty on the plaintiffs than that they should bring into account such sum as they ought with reasonable care to have realized out of the securities which they held for the common benefit. I quite agree that the course they did take was the most prudent they could have adopted, and has had the effect of mitigating the loss which was otherwise inevitable. I think, therefore, that the judgment of Day J. was perfectly right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *C. R. Sawyer & Ellis.*
Solicitors for defendant: *Warren, Murton & Miller.*

E. L.

In re HIGGINSON & DEAN. *Ex parte* THE ATTORNEY-GENERAL.

1898
Nov. 11, 14;
Dec. 21.

Bankruptcy—Proof—Corporation—Dissolution—Claim of Dissolved Corporation—Right of the Crown—Bona Vacantia.

A trading firm became bankrupt in 1847, and a corporation created by statute proved in the bankruptcy, with other creditors. In 1887 the corporation was dissolved by an order of the Court under the Companies Acts. Afterwards it was discovered that the bankrupts had been entitled to certain railway shares, and the official receiver recovered the value of the shares, and held the proceeds as trustee in the bankruptcy. Another creditor moved to expunge the proof of the dissolved corporation, claiming that the money to which the corporation had been entitled as a creditor, and which was then in the hands of the official receiver as trustee, was divisible among the still existing creditors.

The county court judge made an order expunging the proof.

On appeal by the Attorney-General on behalf of the Treasury :—

Held, reversing the order, that on the dissolution of the corporation the proceeds of the shares in the hands of the official receiver as trustee in the bankruptcy had passed to the Crown as bona vacantia, and the Crown was entitled to the amount.

Appeal by the Attorney-General, on behalf of the Treasury, from the order of the judge of the county court at Liverpool, expunging the proof of the Royal Bank of Liverpool in the bankruptcy of the debtors, Messrs. Higginson & Dean. The bankruptcy took place in the year 1847, and the liabilities of the debtors amounted to nearly 900,000*l.* The Royal Bank of Liverpool proved in the bankruptcy for 566,000*l.*, and Messrs. Littledale, who were respondents to the present appeal, and other creditors, proved for smaller sums. It had recently been ascertained that the bankrupts had been entitled to certain shares in the Leeds and Thirsk Railway Company, the undertaking of which company had been acquired by the North Eastern Railway Company, so that the shares belonging to the bankrupts were exchangeable for shares in the North Eastern Railway Company. The official receiver, as ex officio trustee in the bankruptcy, had recovered for the estate a sum of 6500*l.*, the proceeds of these shares, and held that amount as trustee. In the year 1887 an order was made by North J., under the

1898

HIGGINSON & DEAN, *In re.*
ATTORNEY-GENERAL, *Ex parte.*

Companies Acts, dissolving the Royal Bank of Liverpool. Messrs. Littledale, as creditors in the bankruptcy, moved before the county court judge to expunge the proof of the Royal Bank. The judge made an order expunging the proof, and the present appeal was from that order.

Nov. 11, 14. *The Solicitor-General* (*Sir Robert Finlay, Q.C.*) and *Ingle Joyce* (*Avory* with them), for the Attorney-General, in support of the appeal. The order of the county court judge, directing that the proof be expunged, is wrong. There is no power to order a proof to be expunged, unless it was wrongly admitted, for the words of rule 23, in Sched. II. to the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), are: "If the trustee thinks that a proof has been improperly admitted, the Court may, on the application of the trustee, after notice to the creditor who made the proof, expunge the proof or reduce its amount." There can be no question that this proof was properly admitted in the first instance. The effect of the winding-up order is that the bank has ceased to exist, and the property to which the bank was entitled has passed to the Crown as bona vacantia. The statement of the county court judge, to the effect that by the dissolution of a corporation all debts due to it cease to exist (1), is incorrect. Even if the money in question cannot in strictness be described as bona vacantia, still it ought to be carried to the unclaimed dividends account in bankruptcy: Bankruptcy Act, 1883, s. 162, sub-s. 2 (*a*). If the order of the county court stands, the result will be to give the money to which the Royal Bank would have been entitled if it had continued to exist, to the other creditors. None of the authorities go so far as to decide that by the dissolution of a corporation the debts due to the corporation are extinguished. The true effect of what has happened in the present case is, that the trustee in the bankruptcy holds the estate in trust for division among all the creditors, and the Crown, having succeeded to the rights of one of the creditors, namely, the Royal Bank, is entitled.

E. Stewart Brown, for the official receiver.

Muir Mackenzie, for the Board of Trade.

(1) See post, p. 328.

1898

HIGGINSON & DEAN, *In re.*

ATTORNEY-GENERAL, *Ex parte.*

Herbert Reed, Q.C., and *Leslie F. Scott*, for the respondents, Messrs. Littledale. A proof may be expunged by reason of something occurring after its admission, for the proof may have been right when first admitted, but may have become wrong by reason of something happening later, as, for instance, in the case where the creditor died and left a legacy to the bankrupt: *Ex parte Man, In re Harvey.* (1) The money to which the Royal Bank would have been entitled but for its dissolution has now become divisible among the still existing creditors, including Messrs. Littledale. The Crown is seeking to put in suit a chose in action, which cannot possibly come within the designation of bona vacantia, for the words "bona vacantia" necessarily imply the absence of an owner, whereas a chose in action is necessarily vested in some person. The bank here was a statutory corporation, created and dissolved by statute, and therefore none of the authorities relating to common law corporations have any bearing on the case. The true view is that, not only the liabilities, but also the rights of such a corporation as this are extinguished on its dissolution.

The Solicitor-General replied.

The following authorities were referred to: *Edmunds* v *Brown* (2); *Burgess* v. *Wheate* (3); *Middleton* v. *Spicer* (4); *Barclay* v. *Russell* (5); *Ex parte Lacey* (6); *The State Bank* v. *The State* (7); *Ex parte Ross, In re Coles* (8); *Ex parte Richards, In re Trevor* (9); *Taylor* v. *Haygarth* (10); *Dyke* v. *Walford* (11); *Ex parte Anderson, In re Anderson* (12); *Ashley* v. *Ashley* (13); *In re London and Caledonian Marine Insurance Co.* (14); *Coxon* v. *Gorst* (15); *Cunnack* v. *Edwards.* (16).

Cur. adv. vult.

(1) (1829) Mont. & McA. 210.
(2) (1668) 1 Lev. 237.
(3) (1759) 1 Eden, 177.
(4) (1783) 1 Bro. C. C. 201.
(5) (1797) 3 Ves. 424.
(6) (1802) 6 Ves. 625.
(7) (1823) 1 Blackford's Indiana Rep. 267.
(8) (1827) 2 G. & J. 46, 330.
(9) (1835) 4 D. & Ch. 190.
(10) (1844) 14 Sim. 8.
(11) (1848) 5 Moo. P. C. 434.
(12) (1870) L. R. 5 Ch. 473.
(13) (1877) 4 Ch. D. 757.
(14) (1879) 11 Ch. D. 140.
(15) [1891] 2 Ch. 73.
(16) [1896] 2 Ch. 679.

1898

HIGGINSON & DEAN, *In re.*
ATTORNEY-GENERAL, *Ex parte.*

Dec. 21. The written judgment of the Court (Wright and Darling JJ.) was delivered by

WRIGHT J. The debtors became bankrupt so long ago as 1847, owing nearly 900,000*l.* The Royal Bank of Liverpool proved in the bankruptcy for 566,000*l.*, and Messrs. Littledale and other creditors proved for smaller sums. The bankruptcy has never been completely closed. It has lately been discovered that some old railway shares, which were exchangeable for shares in the North Eastern Railway Company, belonged to the estate, and the official receiver, as ex officio trustee in the bankruptcy, has now recovered for the estate, and has in his hands, a sum of 6500*l.*, the proceeds of these shares; and the question is, what is to be done with about 4000*l.*, the Royal Bank's share of the money, that Bank having been completely dissolved eleven years ago by an order of the Court made under the provisions of the Companies Acts?

Messrs. Littledale, as creditors in the bankruptcy, have moved to expunge the Bank's proof, claiming in effect the Bank's 4000*l.* as divisible amongst themselves and the other still existing creditors. The Treasury opposed the motion, claiming to be entitled in right of the Crown to be substituted for the Bank, on the ground that the Bank's interests passed to the Crown as bona vacantia. As an alternative to the Crown's claim it is suggested that the money ought to be carried to the "unclaimed dividends account" in bankruptcy, which is applicable for some public purposes.

The judge of the Bankruptcy Court at Liverpool has expunged the Bank's proof, holding that the Bank "was the subject of annihilation in 1887, and could after that neither sue nor be sued, nor possess any property, nor have any claim in respect to property"; that at present there is "neither a dividend nor a creditor to receive it in existence, but when the creditor was extinguished his proof was extinguished so far as regards any further claims." He adds that "the money out of which the dividend might be declared was never without an owner, namely, the assignee or trustee of the bankrupt's estate, and if so the dividend could not pass to the Crown as property the owner of which could not be found."

Subject to one difficulty I think that the grounds of the learned county court judge's decision cannot be maintained, and that the Crown is entitled to succeed.

From the time of Lord Thurlow's decision in *Middleton* v. *Spicer* (1), in 1783, it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of bona vacantia; and during all the period which has elapsed since that decision no exception from the rule seems to have been established. It has been illustrated by many cases which shew that the possession conferred on the trustee for purposes of jurisdiction or administration gives him no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown. Such cases are: *Barclay* v. *Russell* (2) per Lord Loughborough; *Powell* v. *Merrett* (3), Stuart V.-C.; *Cradock* v. *Owen* (4), Stuart V.-C.; *Read* v. *Stedman* (5), Romilly M.R.; *Cunnack* v. *Edwards* (6), C. A. And in *Dyke* v. *Walford* (7) the right of the Crown as against the ordinary to bona vacantia in cases of intestacy is traced back to very early times.

Nor, I think, is there any authority for holding that the Crown is in any worse position in relation to chattels held in trust for a corporation which has become dissolved than in relation to chattels held in trust for a natural person deceased. The same principle seems applicable in both cases. The Courts will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession, or otherwise. The text-books, such as those of Kyd, Grant, and Lewin, agree, though in some cases with an "it seems," that the Crown is entitled to the personal estate of a dissolved corporation aggregate.

Nor is there any authority for holding that the creditors, other than the dissolved Bank, have any jus accrescendi, or of

(1) 1 Bro. C. C. 201.
(2) 3 Ves. 424, at p. 430.
(3) (1853) 1 Sm. & G. 381.
(4) (1854) 2 Sm. & G. 241.
(5) (1859) 26 Beav. 495.
(6) [1896] 2 Ch. 679.
(7) 5 Moo. P. C. 434.

1898

HIGGINSON & DEAN, *In re.*

ATTORNEY-GENERAL, *Ex parte.*

Wright J.

survivorship, entitling them to the share of the creditor who has become extinct without successor or representative. In *Ashley* v. *Ashley* (1), where, in a suit for administration, such a claim was made and failed, James L.J. asked why the Crown might not take out representation to the petitioners. (2) Primâ facie, therefore, as it seems to me, the Crown is entitled.

The difficulty is, that, as it is argued, on the dissolution of the Bank, not only did its artificial personality come to an end, but the debt due to it from the bankrupts lapsed or was extinguished. The existence of a debt, it is said, imports the existence of two parties to the obligation, and the obligation of the debtors to the bank is not, upon the dissolution of the bank, converted into an obligation of the debtors to the Crown. The bank, therefore, has ceased to be a creditor, and the Crown has not become a creditor; the ground of the proof has gone as completely as if it had never existed, and the proof ought to be expunged, with the consequence that the official receiver is now a trustee of the fund for the remaining creditors, as if there never had been any others. Therefore, it is argued, there is no failure of cestuis que trustent, and no property which, for default of any cestui que trust to claim it, can be said to be held in trust for the Crown.

The authorities for the proposition that on the dissolution of a corporation aggregate debts due to or from it are extinguished are by no means clear or satisfactory. In 1 Bl. Com. p. 484, and in 2 Kyd on Corporations, p. 516, and in Grant on Corporations, p. 303, such a proposition is stated, but in terms which suggest that no more is meant than that, after the dissolution, the individuals who were members or officers of the corporation cannot sue or be sued in respect of its rights or obligations: and this is all that is established by the cases there cited. "The debts of a corporation" (Blackstone says), "either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them, in their natural capacities; agreeable to that maxim of the civil law, si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli

(1) 4 Ch. D. 757.

(2) 4 Ch. D. at p. 763.

debent." The American decision in the case of *The State Bank* v. *The State* (1) relies on those authorities as supporting the general proposition, but it does not advert to this qualification, or add new references to authority, and the authorities cited do not in any way support the proposition, except as so qualified. Grant on Corporations (published in 1850), p. 303, is explicit in the same sense as the American case last cited, but does not refer to any authority which, so far as I can see, has any bearing on the matter.

Nor do the old authorities as to the effect of dissolution of municipal or other corporations add anything decisive of the question. In the 17th and 18th centuries corporations aggregate, constituted by charter or letters patent, were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and reincorporation, with or without change of name or constitution. Many references to such cases will be found in Anderson's Reports and in *Rex* v. *Pasmore*. (2) I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. In *Mayor, &c., of Colchester* v. *Seaber* (3) the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity.

Suppose the bank at the time of its dissolution had been in credit at another bank, or held notes of another bank, or had

(1) 1 Blackford's Indiana Rep. 267. (2) (1789) 3 T. R. 199.
(3) (1766) 3 Burr. 1866.

1898

HIGGINSON & DEAN, *In re.*

ATTORNEY-GENERAL, *Ex parte.*

Wright J.

issued notes of its own. Would the dissolution have destroyed the obligations in these cases? In the United States of America there have been two decisions of Story J., which are against such a conclusion. In *Wood* v. *Dummer* (1) the charter of a bank had expired. Before dissolution the bank had distributed its capital amongst its stockholders, without providing for payment of outstanding notes. It was held that after the dissolution noteholders were entitled to make stockholders account to them, as for moneys impressed with a trust of which the stockholders had notice. In *Mumma* v. *Potomac Co.* (2) it was contended that the dissolution of an insolvent incorporated company, under a statute of the Legislature of a State, was inoperative, as being contrary to the Constitution, which prohibited the impairing of obligations by the Legislatures of particular States. Story J., however, held that the obligations were not impaired by the dissolution: "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of bonâ fide purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." (3) This statement of the law may not perhaps be entirely applicable in this country, but it requires consideration. It might be reasonable to enact that, in analogy to the immemorial law of executors and administrators, and the statute of 31 Edw. 3, st. 1, c. 11, on the dissolution of a corporation aggregate all its rights, including its rights of action on executed contracts, such as those evidenced by bank notes or bonds, or on claims in debt, devolve upon the Crown, subject to payment of the corporation's own debts. It would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust. Such a declaration may have to be made, or advisedly refused, in the case of some of the rapidly-increasing number of companies which are being dissolved under the Companies Acts. But in the present case

(1) (1824) 3 Mason, 308. (2) (1834) 8 Peters, 281.
(3) 8 Peters, at p. 286.

it is not necessary to decide this question. Even if it be the law that a debt due to a corporation aggregate is extinguished by the dissolution of the corporation, I do not think that it follows that the Crown's claim fails in this case. The original assignees in the bankruptcy, and their successors in office, have from the time of the bankruptcy been entitled to the old railway shares in trust for such creditors as had been or might be admitted to proof. The bank immediately before its dissolution was not a mere creditor. It was a creditor whose claim was in proof. Its claim was no longer a mere right of action for a debt. It could no longer have maintained an action as for a debt. The debt had been, at any rate provisionally, merged in an equitable execution (*Twiss* v. *Massey* (1), per Lord Hardwicke; Cooke's Bankrupt Laws, 4th ed. ch. 1, p. 5); and the right to sue had been replaced, not, indeed, by any particular interest in any specific chattels, but by a right to have all the assets, as and when realized, applied pro ratâ for the bank's benefit with the other creditors. This right, as it seems to me, existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property, which devolved upon the Crown as bona vacantia as completely as any other equitable interest. Alternatively, the case may be stated in a different way, but with the same result. From the time of the bankruptcy a title to the shares has been vested in the bankrupts' assignees and their successors, in trust down to 1887 for the bank and the other creditors. In 1887 the bank disappeared. The assignees thereupon did not cease to hold the title to the shares, nor did they cease to hold it as trustees. Their title did not depend upon the continued existence of any particular debt or of any particular creditors, nor did it become extinct upon the extinction of particular creditors. It continued to be a title upon trust, and the Crown takes the place of the extinct cestui que trust. Suppose all the creditors had been corporations aggregate, and all had become dissolved, it seems clear that the

(1) (1737) 1 Atk. 67.

1898

HIGGINSON & DEAN, *In re.* ATTORNEY-GENERAL, *Ex parte.*

Wright J.

assignees could not have taken the property as their own as against the Crown.

It does not seem necessary to examine minutely the provisions of the old Bankruptcy Acts, in order to determine whether the money can be regarded as unclaimed dividends belonging to the statutory fund. If the proof is to stand good for the Crown's benefit, that is another way of saying that the moneys are not unclaimed dividends. If, on the other hand, the proof ought to be expunged, on the ground that the creditor and the creditor's claim are absolutely extinguished, then the case must be the same as if the proof had never been admitted, and the money ought to be divided amongst the other creditors. Unclaimed dividend seems to me to mean dividend which has been declared upon admitted and existing proofs, but which the persons entitled to it neglect to claim; it supposes the existence of some one who could claim and who omits to claim. Here the dividend belongs either to the Crown or to the other creditors, and it is claimed, and therefore it is not unclaimed dividend.

For these reasons we think that the appeal must be allowed. The costs of all parties, here and below, will be allowed out of the fund.

Appeal allowed. Leave to appeal.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Dowson, Ainslie & Martineau, for Gibbons & Arkle, Liverpool.*

Solicitors for official receiver: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitor for Board of Trade: *The Solicitor to the Board of Trade.*

P. B. H.

SWAYNE, Appellant; THE COMMISSIONERS OF INLAND REVENUE, Respondents.

1898
Dec. 14, 21.

Revenue—Stamp Duty—"Conveyance or Transfer on Sale"—Assignment of Leaseholds—Consideration—Rent—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 57, *Sched. I.*

The lessee, for a term of ninety-nine years at a yearly rent, of a piece of land with three houses thereon, assigned and conveyed two of the houses, in consideration of 503*l.*, for the residue of the term subject to an apportioned rent representing two-thirds of the rent reserved by the lease. By the deed of assignment the assignee covenanted to pay such apportioned rent, and to keep the assignor indemnified in respect of it, and the assignor covenanted to pay the remaining one-third of the rent reserved by the lease, and to keep the assignee indemnified in respect of it. The three houses were of the same annual value:—

Held, that, for the purpose of fixing the ad valorem duty chargeable under the heading "Conveyance or Transfer on Sale of any Property" in Sched. I. of the Stamp Act, 1891, the payment of rent by the assignee was not part of the consideration for the assignment, and that duty was chargeable upon the 503*l.* only.

Case stated, on the application of the appellant, by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13, on appeal from the commissioners' decision with respect to the stamp duty with which an instrument, presented by the appellant to them for their opinion, was chargeable.

The following statement of the material facts set forth in the case is taken from the judgment of Bruce J. post.

"In this case one Rowell, by an indenture of lease bearing date October 16, 1893, demised to one Mills a parcel of ground and three dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of 3*l.* 16*s.* 6*d.*, and by the said indenture Mills covenanted to complete the three houses and expend on the building of each of such houses the sum of 100*l.* at the least, and he also entered into numerous other stringent covenants such as are often inserted in what are known as building leases. The three houses were erected and were numbered 6, 7, and 8, Bowden Hill Terrace. Rowell,

1898

SWAYNE v. INLAND REVENUE COMMISSIONERS.

by another indenture of lease bearing date March 10, 1894, demised to Mills a parcel of ground and two dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of 2*l.* 11*s.* The covenants in this indenture, I understand, were similar to the covenants in the indenture of October 16, 1893. The two houses were erected, and were numbered 9 and 10, Bowden Hill Terrace. By an indenture bearing date December 27, 1897, made between Mills of the one part and Annie Penelope Swayne (the appellant) of the other part, Mills, in consideration of the sum of 503*l.* to him paid by the said A. P. Swayne, assigned and conveyed unto the said A. P. Swayne—first, the two houses 7 and 8, Bowden Hill Terrace, being two of the three houses demised by the indenture of October 16, 1893; and, secondly, the two houses 9 and 10, Bowden Hill Terrace, being the two houses demised by the indenture of March 10, 1894, to hold the same unto the said A. P. Swayne for the residue then unexpired of the said several terms of ninety-nine years, subject as to the hereditaments firstly thereinbefore described to the apportioned yearly rent of 2*l.* 11*s.*, part of the yearly rent of 3*l.* 16*s.* 6*d.* reserved by the indenture of October 16, 1893, and to the observance and performance of the covenants and conditions therein contained, and subject as to the hereditaments secondly thereinbefore described to the payment of the yearly rent of 2*l.* 11*s.* reserved by the indenture of March 10, 1894, and to the observance and performance of the covenants and conditions therein contained. A. P. Swayne covenanted with Mills to pay the several sums of 2*l.* 11*s.*, and to observe and perform the covenants and conditions in the said leases to Mills respectively contained and to keep Mills indemnified; and Mills covenanted with A. P. Swayne to pay the apportioned rent of 1*l.* 5*s.* 6*d.*, the residue of the rent reserved by the indenture of October 16, 1893, and to keep the said A. P. Swayne indemnified in respect thereof."

The commissioners were of opinion that the instrument fell to be charged under the head "Conveyance on Sale" in the 1st schedule to the Stamp Act, 1891. In accordance with their practice they did not assess duty upon the capitalised

value of the yearly rent of 2*l.* 11*s.* payable in respect of the houses numbered 9 and 10, Bowden Hill Terrace. They were of opinion, however, that duty was chargeable upon the rent of the same amount payable in respect of the houses 7 and 8, Bowden Hill Terrace, and they assessed duty upon the said sum multiplied by twenty under s. 56, sub-s. 2, of the same Act. (1) They also assessed duty upon the sum of 503*l.*, the premium payable under the instrument, which was stamped in accordance with their assessment.

The questions for the opinion of the Court were:—

1. Whether the instrument was chargeable with the duty in accordance with the assessment of the commissioners:

2. If not, with what duty the instrument was chargeable.

Vaughan Hawkins, for the appellant. The tax imposed upon conveyances on sale in the 1st schedule of the Stamp Act, 1891, is not upon the thing sold but upon the price given for it, though no doubt it is material to consider what is the thing sold, because it is exclusive of the price. Here the price was

(1) The Stamp Act, 1891 (54 & 55 Vict. c. 39).

Sect. 1 provides that the stamp duties to be charged upon the several instruments in the 1st schedule to the Act shall be the several duties specified in the said schedule, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by the Act.

Amongst the instruments specified in the 1st schedule are "Conveyance or Transfer on Sale of any Property" (except certain stock), and ad valorem duties are set forth in respect of such instruments, "where the amount or value of the consideration for the sale does not exceed" certain specified amounts.

Sect. 56, sub-s. 2: "Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity . . . . the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

Sect. 57: "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty."

1898

SWAYNE v. INLAND REVENUE COMMISSIONERS.

503*l.*, and duty is chargeable in respect of that sum only, and not in respect of the capitalised value of the rent payable by the assignee. On a sale of leasehold property the thing bought is the property subject to the rent; the obligation to pay rent is part of the thing bought.

[He was stopped.]

Danckwerts (*Sir R. B. Finlay, S.-G.*, with him), for the Crown. Payment of rent by the assignee is really part of the consideration for the assignment, because the assignor, pro tanto, escapes liability to the lessor. There is no privity between the assignee and the lessor. The assignor makes what bargain he pleases with the assignee. The consideration for the assignment may be, wholly or in part, the payment yearly by the assignee for the residue of the term of a sum exceeding the yearly rent reserved by the lease. It is just as much part of the consideration for the assignment where the same or a less sum than the rent reserved is payable by the assignee. Sect. 57 of the Stamp Act, 1891, applies to this case. By the assignment the premises are conveyed "subject to the payment of money" to the assignor—namely, 2*l.* 11*s.*; and that sum is, therefore, "to be deemed part of the consideration" within s. 57. Whether or not the sum be a charge upon the premises is immaterial. Sect. 56, sub-s. 2, provides the way in which the amount of duty payable is to be ascertained. Reading ss. 56 and 57 together, rent is clearly deemed to be part of the consideration. The decision of the commissioners, it is submitted, was right.

Vaughan Hawkins, for the appellant. No such claim as this was made by the Crown before 1894. The consideration for the assignment of a lease has always been treated as the sum paid for the property which is subject to the rent reserved by the lease. The liability to pay rent is necessarily incident to and inseparable from the property. Sect. 57 does not apply to a payment of that kind: it applies to contracts for the transfer of property where the transferee undertakes external and separate liabilities in respect of the property, such as transfers of shares in partnerships, with liability to pay existing debts of the partnership or transfers of shares in a limited company, with liability

to pay calls. *Christie* v. *Commissioners of Inland Revenue* (1) is an instance of that class of contract. The words "any money" in s. 57 do not apply to payment of rent. The history of the legislation down to and including the Stamp Act, 1870 (33 & 34 Vict. c. 97), and the way in which the language of these Acts imposing stamp duty ought to be construed, is stated in the judgments in *Commissioners of Inland Revenue* v. *Liquidators of City of Glasgow Bank* (2), and it was pointed out in those judgments that the Act of 1870 (s. 73 of which Act is reproduced by s. 57 of the Act of 1891) was substantially a consolidating Act. The distinction between rent and separate and external liabilities, whether absolute or contingent, forming part of the consideration for the contract may be gathered from the decisions on the Stamp Acts passed prior to that of 1891: *Marquis of Chandos* v. *Commissioners of Inland Revenue* (3); *Mortimore* v. *Commissioners of Inland Revenue* (4); *Ulverstone and Lancashire Ry. Co.* v. *Commissioners of Inland Revenue*. (5) See also Dart's Vendors and Purchasers, 6th ed. p. 788

Sir R. B. Finlay, S.-G., replied.

Cur. adv. vult.

1898. Dec. 21. The following written judgment was delivered by

BRUCE J., who, after stating the facts as set forth ante, proceeded:—

The question raised by the case is what is the amount of stamp duty to which the indenture of December 27, 1897, is subject. The indenture is taxable under the head "Conveyance or Transfer on Sale" contained in the schedule to the Stamp Act, 1891. The duty is an ad valorem duty on the amount or value of the consideration for the sale. It is quite clear that the ad valorem duty is payable in respect of the sum of 503*l*., the consideration money expressed in the indenture. But the commissioners contend that the ad valorem duty is also

(1) (1866) L. R. 2 Ex. 46.
(2) (1881) 8 R. 389.
(3) (1851) 6 Ex. 464.
(4) (1864) 2 H. & C. 838.
(5) (1864) 2 H. & C. 855.

1898

SWAYNE v. INLAND REVENUE COMMISSIONERS.

Bruce J.

chargeable in respect of the yearly rent payable for houses 7 and 8, Bowden Hill Terrace, because they say that rent is to be regarded as part of the consideration for the conveyance. This contention is founded upon the 57th section of the Stamp Act, 1891, which is in these terms: [The learned judge read s. 57]. The particular words relied upon are these: "Where property is conveyed to any person subject to the payment of any money the money is to be deemed part of the consideration in respect whereof the conveyance is chargeable with ad valorem duty." It is said that the assignment to A. P. Swayne of the houses 7 and 8, Bowden Hill Terrace was subject to the payment by her of the rent of 2*l.* 11*s.*, and that therefore, by the terms of the section above referred to, the 2*l.* 11*s.* is to be deemed part of the consideration. The commissioners did not insist upon treating the payment of the rent of 2*l.* 11*s.*, payable in respect of the houses 9 and 10, Bowden Hill Terrace, in the same way, because we are told that in cases where there has been no apportionment of the rent reserved by the original lease and the lease of the whole of the demised premises has been assigned subject to the payment of the rent reserved by the original lease, it has never been the practice of the commissioners to treat the rent reserved as forming any part of the consideration for the assignment. With the practice the commissioners think right to pursue it seems to me we have nothing to do—they may have good reasons for enforcing the duty in one case and not in another—but I am satisfied that, so far as the construction of the statute is concerned, no distinction whatever can be drawn between a case in which the rent reserved on an assignment of a lease is the rent reserved by the original lease, or is a part only of that rent. If the commissioners have the right to require the sum of 2*l.* 11*s.* to be treated as part of the consideration as regards the assignment of the lease of houses 7 and 8, they have the same right with regard to the 2*l.* 11*s.* payable in respect of houses 9 and 10. But, in my opinion, they have no such right in either case. The question turns upon the meaning of the words "subject to the payment of any money." Of course, where leasehold property is assigned it is commonly assigned subject to the payment of rent, because the payment of rent

is an obligation ordinarily incident to leasehold property. But when we come to look at the preceding words in the section—"conveyed to any person in consideration wholly or in part of any debt due to him"—which govern the words "or subject to the payment of any money," it seems to me that it is reasonable to construe the section as pointing to a liability to pay money arising in some way other than as incident to and inseparably connected with the property conveyed. Where a lease for years subject to the payment of an annual rent is conveyed or assigned, the very property conveyed is in its nature a qualified property, and the liability to pay rent arises out of the nature of the estate conveyed. The liability to pay is not in the nature of a charge or incumbrance on the property; it does not even arise out of any independent stipulation that the money shall be paid; it is inherent in the nature of the property, and can never be extinguished so long as the character of the property remains. The history of the legislation on this subject, I think, confirms the view that I have expressed. It is related in the judgments delivered by the Lord President and the other judges of the Court of Session in the case of *Commissioners of Inland Revenue* v. *Liquidators of City of Glasgow Bank*. (1) Where property is incumbered and is sold subject to the incumbrance, or even subject to a bond or condition that certain money shall be paid in futuro, then upon payment off of the incumbrance, or upon payment of the money stipulated to be paid in futuro, the purchaser obtains an estate discharged from the incumbrance, or bond, or condition, and the money so paid in discharge of the incumbrance, or bond, or condition is paid indirectly as part of the purchase-money of the estate, and therefore it is right that the sums of money, upon the payment of which the purchaser is able to obtain an unincumbered estate, should be taken into consideration as forming part of the purchase-money and be added to the amount paid by the purchaser as the price of the incumbered estate, or as the price of the estate sold burthened with the condition of the payment of money in futuro. It was to meet cases of this kind that from time to time various provisions have been made by the

(1) 8 R. 389.

1898

SWAYNE v. INLAND REVENUE COMMISSIONERS.

Bruce J.

Legislature, the last of which is contained in the section now under consideration. No doubt the words in the section are very wide, but I think they cannot properly be applied to mean more—to use the language of Martin B. in the case of *Mortimore* v. *Commissioners of Inland Revenue* (1)—than this, that ad valorem duty shall be paid "on the entire consideration which, either directly or indirectly, represents the value of the free and unincumbered corpus of the subject-matter of sale." Where, as in this case, the liability to pay is an incident of the corpus of the sale and inseparable from it, and from which the corpus never can be freed, it seems to me that it would be giving too comprehensive a meaning to the words of the Legislature to hold that the rent to which the corpus is subject should be treated as if it were an incumbrance, or was in any sense to be regarded, directly or indirectly, as purchase-money. In the present case the lease of October 16, 1893, contains various covenants by Mills—among others, covenants to repair, to keep the premises insured, and to execute all works that may be necessary in order to secure certain footways and roadways being taken over by the local authority of the district—and the indenture of assignment of December 27, 1897, makes over the lease to A. P. Swayne, subject to the observance and performance on her part of the above covenants. In a sense, therefore, the property is conveyed to A. P. Swayne, subject to the payment of all the moneys that may require to be expended by virtue of these covenants, and yet, I think, it would be obviously unreasonable to hold that such sums should be treated as forming part of the consideration for the purchase. It was said in argument by counsel for the Crown that cases might arise in which an assignment or transfer of a lease might be made on terms imposing a higher yearly rent than the rent reserved by the original lease, and in consideration of such higher rent the purchase-money payable on the assignment or transfer might be reduced, and in such a case, if the ad valorem duty were charged on the purchase-money alone, without reference to the increased rent, part of what really formed the consideration for the transfer would escape the duty. On that I may make two

(1) 2 H. & C. 838.

observations. First, the circumstances suggested do not arise in the present case. It is an admitted fact in the case that the three houses 6, 7, and 8 comprised in the original lease of October 16, 1893, are of equal value, and the rent reserved by the indenture of assignment of December 27, 1897, for the two houses 7 and 8 is exactly two-thirds of the rent reserved in respect of the three houses comprised in the original lease. There is, therefore, in this case no room for the suggestion that the rent reserved by the indenture of assignment has been in any way manipulated so as to reduce or in any way affect the purchase-money of 503*l.* upon which the ad valorem duty is payable. Secondly, the words of the 57th section are not directed to meet such a case as is suggested. The words of the section, if they apply at all, apply to all cases where property is conveyed subject to the payment of money, whether the payment bears any relation to the consideration for the purchase or not; and for the reasons I have given I think it is unreasonable to ascribe to the words so wide a meaning as to include such a case as that now under consideration.

If a case were established where it was clear that on an assignment of a lease the rent imposed by the assignment had been increased above the rent reserved by the original lease in order that the purchase-money payable on the assignment might be reduced, whether it might not be possible in some way to take into consideration the whole circumstances in order to ascertain the real amount or value of the actual consideration paid directly or indirectly on the simple words contained in the schedule to the Act, without reference in any way to the words of s. 57, I give no opinion; because in the present case the question does not arise. All that we decide here is that the words of the 57th section do not meet the present case.

WILLS J. I entirely agree in the judgment which has just been pronounced. There are a few observations, however, which may, I think, appropriately be added. The real question is, what is the meaning to be put upon the word "property" in s. 57 of the Stamp Act, 1891? In the case of a mortgage it

1898

SWAYNE v. INLAND REVENUE COMMISSIONERS.

WILLS J.

has been held to be the physical property which is the subject of the mortgage considered as unincumbered. But the question is wholly different with regard to leaseholds. I would observe that the art of interpreting statutes of this character—statutes which impose taxation—cannot be considered an exact science; it is rather a practical art, and the questions which arise cannot be dealt with as though they were simple questions to be settled upon principles of common law. Now, leasehold property is a kind of property perfectly well known to the law with all its incidents. In the very great majority of cases leasehold properties are burdened with liabilities. In the case of ordinary leases of house property they are burdened with a rack-rent, and it has never occurred to anybody to suppose that, upon the assignment of a lease of that kind, the rack-rent is to be treated as a burden on the property which is assumed, as part of the purchase-money, by the assignee. The commissioners themselves have never acted upon such a view. I pointed out during the argument for the Crown, and no answer was or could be given to the observation, that if the contention for the Crown were right, the commissioners have always been wrong in the way they have treated leasehold property for the purposes of taxation, and that they ought, upon every assignment, to have treated the rack-rent as a subject-matter to be capitalised for the purpose of ascertaining what the stamp duty should be. I certainly cannot assent to the suggestion made during the argument for the Crown, that the commissioners, as representing Her Majesty, are at liberty to avail themselves of anything like a dispensing power—to say what portions of a taxing Act they think reasonable and what unreasonable, and therefore to collect some duties and reject others. What in the present case was the property conveyed by the assignment? What Mills had to sell was a leasehold, not unburdened, but subject to a liability for the purchaser to be distrained upon for 3*l.* 16*s.* 6*d.* annually. He could not convey any portion of the land subject to this undivided sum otherwise than as subject to this burden, and it made no difference whether or not he said in his conveyance that he conveyed subject to the burden, or any part of it. The pro-

perty he had to convey was the physical property—the enjoyment of the land—for the residue of the term subject to the annual payment of 3*l.* 16*s.* 6*d.* He affected to convey it subject to 2*l.* 11*s.* only; but the only effect of that, coupled with his express covenant, was to give to the purchaser a personal indemnity to the extent of 1*l.* 5*s.* 6*d.* per annum, and that indemnity is really a part of the consideration given by him in exchange for the 503*l.*; and 503*l.*, therefore, is, if anything, more and not less than the consideration the purchaser gave for the physical property conveyed.

For these reasons, I am of opinion that our judgment should be for the appellant.

Judgment for the appellant.

Solicitors for appellant: *Bridgeman & Willcocks, for Baker, Watts, Alsop & Woollcombe, Newton Abbot.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

W. A.

KNIGHTS DEEP, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp Duty—Debenture—Redemption on Contingency—"Marketable Security"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

A limited company issued a series of debentures for 100*l.* each, redeemable by annual drawings on and after July 1, 1902, and each debenture contained a stipulation that the company might, at any time after July 1, 1900, on giving six months' previous notice in writing to the registered holder, redeem the debenture at 103*l.*, which sum, at the expiration of such six months, should become payable as if the same were the amount of the principal moneys thereby secured:—

Held, that the ad valorem stamp duty chargeable under the head of "Marketable Security" in the 1st schedule to the Stamp Act, 1891, was chargeable upon 103*l.*, as being the "money secured" by the debenture within the meaning of the schedule.

CASE stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On October 8, 1898, a debenture of the same date was presented on behalf of the issuers thereof, Knights Deep, Limited (being the appellant company), by their solicitors, to the

1898

KNIGHTS DEEP, LIMITED v. INLAND REVENUE COMMISSIONERS.

Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The following (so far as material for the purposes of this report) is a copy of the instrument in question:—

"No. 1641. First Debenture. 100*l.*

"The Knights Deep, Limited.

"Incorporated under the laws of the South African Republic. Share Capital 550,000*l.*, divided into 550,000 shares of 1*l.* each. Issue of 400,000*l.* debentures in 4000 debentures of 100*l.* each, carrying interest at the rate of 5*l.* 10*s.* per cent. per annum.

"All ranking equally in security . . . .

"For valuable consideration already received the Knights Deep, Limited (hereinafter called the company), will, as and when the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon, pay to the Simmer & Jack Proprietory Mines, Limited, of &c., or other the registered holder for the time being hereof, the sum of 100*l.*

"The company will, in the meantime until such payment, pay interest thereon at the rate of 5*l.* 10*s.* per cent. per annum by half-yearly payments on every first day of July and first day of January.

"This debenture is issued subject to the conditions endorsed hereon, which are to be deemed part of it.

"Given, &c.

"The conditions within referred to.

"1. This debenture is one of a series of debentures of the company for securing principal sums amounting in the aggregate to 400,000*l.*, carrying interest at the rate of 5*l.* 10*s.* per cent. per annum, and they are all to rank, pari passu, in point of charge without any preference or priority one over another."

"3. The registered holder or his legal representative will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not

be bound to enter in the register notice of any trust or to recognise any right in any other person save as herein provided.

"4. Every transfer of this debenture must be in writing under the hand of the registered owner or his legal personal representatives. . . .

"5. Debentures of the nominal value of 26,600*l.* will be redeemed by the company on July 1, 1902, and on each succeeding 1st of July up to and including July 1, 1917, when the balance then outstanding shall be redeemed."

"9. The particular debentures to be redeemed will be determined by annual drawings, which the company will cause to be made at its branch office in London for the time being, or at such other place as the company may from time to time determine."

"17. The company may at any time after July 1, 1900, redeem this debenture at 103*l.*, on giving six calendar months' previous notice in writing so to do to the registered holder, ... and upon the expiration of such notice the said sum of 103*l.* shall become payable as if the same was the amount of the principal moneys hereby secured, and shall thereupon cease to carry interest. Provided always that the company shall not be at liberty to give such notice unless concurrently it shall give due notice to redeem in like manner all the then outstanding debentures of the said series. . . ." (1)

The appellants are a foreign company, and the debenture was made and issued by them in the United Kingdom, and was capable of being sold in a stock market in the United Kingdom. Under these circumstances it was admitted that the debenture fell within Division B of the following head of charges in the 1st schedule of the Stamp Act, 1891, namely: "Marketable Security . . . . (B) being a security not transferable by delivery. . . . .

For or in respect of the money thereby secured.	The same ad valorem duty according to the nature of the security as upon a mortgage."

(1) By a trust deed of April 24, 1898, which was referred to in the debenture, the company charged the undertaking and all other their property and assets with "the payment of all moneys payable under the debentures."

1898

KNIGHTS DEEP, LIMITED v. INLAND REVENUE COMMISSIONERS.

The commissioners were of opinion that "the money thereby secured" within the meaning of the said head of charge was the sum of 103*l.*, and accordingly assessed the instrument as liable to a duty of 3*s.* 9*d.*, being the duty payable on a mortgage of that amount.

The appellants, contending that the money secured by the debenture was 100*l.* only, and that the duty chargeable was 2*s.* 6*d.*, required the commissioners to state this case.

The questions for the opinion of the Court were:—

1. Whether the instrument was chargeable with the duty of 3*s.* 9*d.* in accordance with the assessment of the commissioners.

2. If not, with what duty the instrument was chargeable.

T. E. Scrutton, for the appellants. The debenture, when presented for stamping, is a security for 100*l.* only; until the year 1900 it cannot by any possibility become anything else. The "money thereby secured" is 100*l.* and no more. This case differs from *Rowell* v. *Inland Revenue Commissioners* (1), because there was there no option with respect to the payment of the extra sum mentioned in the debenture. Vaughan Williams J. (2) said that if there had been no time fixed at which the company were bound to redeem the debenture at 107*l.* 10*s.*, but only an option given to them at any time to pay off the debenture, if they thought fit to pay the premium of 7*l.* 10*s.*, he should have said that the 7*l.* 10*s.* was not included in the money secured by the debenture, but that it was a mere price paid for the privilege of redeeming. That dictum applies here.

Sir R. B. Finlay, S.-G. (*Danckwerts* with him), for the Crown. The debenture is a security for the payment of 103*l.* It is an absolute promise to pay that sum upon the contingency of the company giving the prescribed notice to redeem after July 1, 1900. When the contingency occurs it becomes a mortgage; but, if not, it is within the words "marketable security, being a security not transferable by delivery"; and duty is payable upon it under the heading in the schedule, "Mortgage, Bond, Debenture, Covenant"; it is a covenant to pay 103*l.* The dictum of Vaughan Williams J. in *Rowell v.*

(1) [1897] 2 Q. B. 194. (2) [1897] 2 Q. B. at p. 198.

Inland Revenue Commissioners (1) is, it is submitted, erroneous if it was meant to apply to such facts as those in the present case. That decision establishes that a debenture such as this comes under the heading "Marketable Security" in the 1st schedule.

[He referred to *Jones* v. *Commissioners of Inland Revenue*. (2)]

T. E. Scrutton, for the appellants. There are three promises to pay in the debenture—first, to pay the principal sum, 100*l*.; secondly, to pay interest, 5*l*. 10*s*. yearly, until redemption; and, thirdly, to pay 103*l*. on notice to redeem being given by the company after July 1, 1900. No distinction can be drawn between the three, and yet duty is not charged upon interest. If the instrument is to be treated as a security because there is a covenant to pay, then the covenant is just as much to pay interest as it is to pay the 103*l*. The "money thereby secured" means the principal sum secured—in this case 100*l*.—and does not include the extra 3*l*.

Sir R. B. Finlay, S.-G. in reply. Under the heading in the schedule, "Mortgage, Bond, Debenture, Covenant," it is clear that duty is chargeable upon the principal sum only, without taking into account interest. Sect. 86 of the Act provides that "for the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time," and s. 88 provides the mode in which the principal sum is to be ascertained. Whether the debenture be treated as "mortgage" or "covenant," interest is not part of the "money thereby secured" within the meaning of the Act. Long before the passing of the Act of 1891 it was held, in *Barker* v. *Smark* (3), that a bond to secure a principal sum, with interest, was only liable to stamp duty on the principal sum. The Act of 1891 has ratified that decision and the practice which had prevailed for a long time prior to 1891.

WILLS J. This case is not free from doubt, but I have come to the conclusion that our judgment should be for the

(1) [1897] 2 Q. B. 194. (2) [1895] 1 Q. B. 484.
(3) (1841) 7 M. & W. 590.

1898

KNIGHTS DEEP, LIMITED v. INLAND REVENUE COMMISSIONERS.

Wills J.

Crown. I think that this debenture, so far as it comes under "mortgage," is a security for 100*l.* only, and does not extend to the extra 3*l.* That, however, does not settle the question. It is plain, to my mind, if one looks at that part of the schedule which deals with "bond, covenant, or instrument of any kind whatsoever," and also at that part which deals with "mortgage, bond, debenture, covenant, and warrant of attorney," that "security" is used in a sense which embraces them all in each place. I should suppose, therefore, unless there is some good reason to the contrary, that when "security" is used in the expression "marketable security," the word is meant to have the same wide and comprehensive meaning; and the fact that, in respect of the extra 3*l.*, there is merely in the debenture a covenant to pay will not prevent that sum from being "money thereby secured" within the meaning of the schedule. If that be so, the debenture is, I think, a security for 103*l.*, because there is undoubtedly a definite promise by the company to pay 103*l.* if they choose to redeem the debenture after July 1, 1900, and give six months' notice in writing of their intention so to do. The obligation to pay that sum is unqualified, and becomes subsisting when the six months' notice has been given. It is, therefore, a covenant to pay 103*l.* on a contingency. That would be enough to dispose of the question in favour of the Crown but for the point taken by the appellants' counsel that there is in the debenture a covenant just as much to pay interest as to pay principal. So undoubtedly there is; but I think it quite clear from the definition of "mortgage" in s. 86 of the Stamp Act, 1891, and the case of *Barker* v. *Smark* (1), which was decided long prior to the passing of that Act, that in statutes of this kind the duty payable in respect of a security by way of mortgage is only upon the principal sum secured. *Barker* v. *Smark* (1) was decided at a time when there was no possibility of curing a stamp objection—when an objection taken under the Act would have been fatal—and I think the result both of the special expression of the Act of 1891 in that part of the schedule which deals with "bond, covenant, or instrument of any kind whatsoever,"

(1) 7 M. & W. 590.

and in s. 86, is that for the purposes of stamp duty interest is to be excluded from the computation, and that the view taken by the Court in *Barker* v. *Smark* (1) has received legislative sanction. I may say that the reasoning of that case, so far as mere words are concerned, does not satisfy me. I cannot see why the covenant to pay interest is not just as much a covenant to pay a sum secured by the instrument as the covenant to pay principal; but when once the contrary has been decided, and the view taken by the Court has been sanctioned by enactment, it is useless to go back upon it. I certainly, however, do not feel disposed to adopt that view when applied to a subject-matter—the 3*l.*—which stands upon a very different footing. If there were no absolute covenant to pay the 3*l.* in a certain event, but only a stipulation that if the company chose to pay the 3*l.* they were to have the privilege of paying off the principal should they be called upon to do so, the case would be different. The dicta in *Rowell* v. *Inland Revenue Commissioners* (2) are a warning against saying precisely what ought to be decided on a state of facts not judicially before the Court, and it is, therefore, perhaps enough to say that the suggested covenant would be very different from that now before the Court and would raise very different considerations, but it would be perfectly different from what ought to be decided in the present case. In the present case, upon the company giving the notice—that is to say, upon the happening of a contingency which is absolutely within their power to bring about or not—there is a positive and absolute promise to pay. It seems to me that according to the decision—I do not say the dicta—in *Rowell* v. *Inland Revenue Commissioners* (2) this instrument is a security within the meaning of the Stamp Act and schedule, and it follows, for the reasons I have given, that it is a security on a contingency for 103*l.* If so, the higher rate of duty applies to it.

BRUCE J. I am of the same opinion. The principal sum secured by the debenture is 100*l.*, but in a certain event the sum of 3*l.* becomes payable in addition to the sum of 100*l.* If

(1) 7 M. & W. 590. (2) [1897] 2 Q. B. 194.

1898

KNIGHTS DEEP, LIMITED v. INLAND REVENUE COMMISSIONERS.

Bruce J.

and when the 3*l.* becomes payable it is to be the same, according to the conditions of the debenture, as if it was part of the principal sum. Therefore the 3*l.*, if the event happens, becomes secured in the sense that it is included in the covenant to pay. Then, why is not duty payable in respect of the 3*l.* so secured? It is said that it is only subject to a condition that it becomes payable; and yet it seems to be admitted that the fact that it becomes payable only on the condition makes no difference, because the fact that it is only on the happening of a certain event that the 3*l.* becomes payable is not relied upon as making a distinction in the case.

Then the other point taken is this: that interest is secured by the debenture, and yet duty is not payable upon interest. I can only say with reference to that, that it has for a long time been decided by authority that interest is not to be regarded as money secured by the instrument for the purpose of settling the amount of duty. I do not know why. I do not see that we can say that this 3*l.*, which is to be payable by way of premium, is in the nature of interest, and I do not see any reason why the principle laid down with regard to the payment of interest should apply to the payment of the premium of 3*l.* Therefore, I think, we must hold that the Crown are right in their contention, and entitled to the higher duty.

Judgment for the Crown. (1)

Solicitors for appellants: *Julius & Thomas.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) Another case was stated by the commissioners with respect to a debenture issued by the appellants "to bearer." It was admitted both by counsel for the appellants and for the commissioners that no distinction was to be drawn between the two classes of debentures for the purpose of determining the points of law involved, and it is understood to have been agreed that the decision of the case here reported should govern the other case.

W. A.

LANCASHIRE INSURANCE COMPANY, APPELLANTS; COMMISSIONERS OF INLAND REVENUE, RESPONDENTS. 1898 *Dec.* 14, 15.

VULCAN BOILER AND GENERAL INSURANCE COMPANY, LIMITED, APPELLANTS; COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Duty—Insurance against Accident—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 98, *Sched. I.*

An insurance company by a policy granted to employers of labour agreed to pay, for and on behalf of the employers, such sums as they should become liable to pay under the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1897, or by the common law, in respect of personal injury to any workmen in their employ:—

Held, that this instrument was not "a policy of insurance against accident" within the meaning of s. 98 and Sched. I. of the Stamp Act, 1891, and therefore was not chargeable with the duty imposed by the Act in respect of such policies.

THESE were cases stated, upon the application of the appellants in each case, by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

LANCASHIRE INSURANCE COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

The following material facts were stated in the case:—

On September 8, 1898, an instrument under the seal of the appellant company was presented on their behalf, by their solicitors, to the commissioners, under s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the instrument was chargeable.

The instrument in question was a deed under the seal of the appellant company, dated August 30, 1898, and the parts of it which are material for the purposes of this report were as follows:—

"Employers' Liability Policy.

First premium to August 9, 1899—9*s.* 6*d.*

Employers' insurance policy against the full liability under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897, and also against the liability at common law.

Estimated amount of wages, &c., on which the undermentioned sum paid in respect of premium has been calculated—127*l.* 8*s.*

Sum paid in respect of premium—9*s.* 6*d.*

1898

LANCASHIRE INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

VULCAN BOILER AND GENERAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

"Whereas Messrs. Wren, Rogers & Company of Smithfield Street, Birmingham, carrying on the business of iron and metal merchants and no other for the purpose of the risk under this policy (and who and whose personal representatives or successors in the business are hereinafter called 'The Employer'), has paid to the Lancashire Insurance Company (hereinafter called 'The Company'), the sum mentioned above in respect of premium, and has delivered to the company a proposal in writing (which is hereby declared to be the basis of and to form part of this contract) for an indemnity against claims for compensation for personal injury sustained by workmen as hereinafter mentioned:

"Now these presents witness and it is hereby agreed as follows:—The company shall pay for and on behalf of the employer such sums as the employer shall become liable to pay under or by virtue of the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or under or by virtue of the common law, in respect of personal injury caused in the above-mentioned business during the continuance of this policy to any workmen in the employ of the employer, or of any sub-contractor, for injury to whose workmen he may be answerable."

The commissioners, being of opinion that the instrument was not "a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury," held that the instrument was not a "policy of insurance against accident" as defined in s. 98, sub-s. 1, of the Stamp Act, 1891 (1), and was not charge-

(1) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, provides that the stamp duties to be charged upon the several instruments in the first schedule to the Act shall be the several duties specified in the said schedule, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by the Act.

In the first schedule is: "Policy of insurance against accident, and policy of insuraunce for any payment agreed to be made during the sickness of any person, or his incapacity from personal injury, or by way of indemnity against loss or damage of or to any property —1*d*."

In the same schedule the stamp duty is 10s. upon a "deed of any kind whatsoever, not described in this schedule."

Sect. 98, sub-s. 1: "For the purposes of this Act . . . . the expression

able by reference to the head of charge, "Policy of insurance against accident, and policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury" in the 1st schedule to the said Act. They consequently held that it was liable to the duty of 10*s*. as a deed. The instrument has been stamped in accordance with the assessment.

The questions for the opinion of the Court are :—

(1.) Whether the instrument is chargeable with the duty in accordance with the assessment of the commissioners?

(2.) If not, with what duty the instrument is chargeable?

Cohen, Q.C. (*F. L. Wright* with him), for the appellants. The policy granted by the appellants is a "policy of insurance against accident" within the definition in s. 98, sub-s. 1, of the Stamp Act, 1891. It provides for a payment to be made by the insurers on death or injury from accident, and in order to come within sub-s. 1 their liability need not be limited to the death or injury from accident of the grantees of the policy. The definition of "policy of life insurance" in the same sub-section is "a policy of insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives except a policy of insurance against accident." The policy is not the less a "policy of insurance against accident" merely because the happening of an event other than death or accident from injury is a condition precedent to the insurers' liability to pay. Ordinary life policies and accident policies usually contain stipulations for notices of death or injury, &c., to be given, the observance of which is made a condition precedent to the insurers' liability; but such policies are none the less life policies or accident policies. Taxing Acts should be construed according to the letter of the law, and where the charge sought to be enforced against the subject is shewn by clear and unambiguous language the Court ought to give effect

---

'policy of insurance against accident' means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury. . . . ."

1898

LANCASHIRE INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

VULCAN BOILER AND GENERAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

to it: *Oriental Bank Corporation* v. *Wright* (1); *Colquhoun* v. *Brooks*. (2) It is submitted that this is a policy of insurance against accident within the plain meaning of the words in the definition in s. 98, sub-s. 1.

Sir R. B. Finlay, S.-G., and *Danckwerts*, for the Crown. This is not a policy of insurance against accident. It is not a policy of insurance for a payment agreed to be made upon death from accident only, or as compensation for personal injury. The subject-matter of the insurance is different. A policy against accident is a contract made with the insured to pay him or his representatives certain sums in case of his death or injury by accident to himself. It is not a contract of indemnity, but a contract to pay a certain sum on the contingency of the happening of certain events whether death or injury. A policy of life insurance is not a contract of indemnity, and the same observation applies to accident policies: *Dalby* v. *East India Insurance Co.* (3); *Theobald* v. *Railway Passengers Assurance Co.* (4); *Bradburn* v. *Great Western Ry. Co.* (5); *Darrell* v. *Tibbitts*. (6) The policy issued by the appellants is a contract to indemnify the insured against payments which they may become liable to make to any of their workmen. The subject-matter insured is the master's liability. Two contingencies must happen before the appellants can be made liable under the policy—there must be death or injury from accident to a workman, and liability of the master to pay for such death or injury. The master does not under this policy receive money as "compensation for personal injury"; he receives it as a sum due under a contract to indemnify him in respect of his own liability to make compensation.

Cohen, Q.C., replied.

VULCAN BOILER AND GENERAL INSURANCE COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

The question raised in this case was substantially the same, namely, whether a policy granted by the appellant company to

(1) (1880) 5 App. Cas. 842, Lord Blackburn at p. 856.
(2) (1888) 21 Q. B. D. 52, Fry L.J. at p. 62.
(3) (1854) 15 C. B. 365.
(4) (1854) 10 Ex. 45, per Alderson B. at p. 53.
(5) (1874) L. R. 10 Ex. 1.
(6) (1880) 5 Q. B. D. 560.

Messrs. Moore & Cattell of Lapal Works, near Halesowen, manufacturers of heel and toe tips, &c., was a "policy of insurance against accident" within the meaning of the Stamp Act, 1891.

The instrument in question was an agreement not under seal by which the appellant company, in consideration of the premium therein specified, agreed as follows: "The company indemnifies the employer fully and completely against all liability under or by virtue of the Workmen's Compensation Act, 1897, the Employers' Liability Act, 1880, or the common law, in respect of any injury which, during the continuance of this policy, shall happen to any workman whilst in his employ and engaged in the above-mentioned business."

The commissioners held that this instrument was not a policy of insurance against accident within the meaning of the Stamp Act, 1891, and that it was liable to the duty of 6*d.* as an agreement.

The questions for the opinion of the Court were whether the instrument was chargeable with the duty in accordance with the assessment of the commissioners, and, if not, with what duty the instrument was chargeable.

Jelf, Q.C. (*J. E. Bankes* with him), for the appellants, submitted that the agreement was a policy of insurance against accident, and ought therefore, under Sched. I., to be stamped with a penny stamp instead of a sixpenny stamp as an agreement or any memorandum of an agreement under hand only and not otherwise specifically charged with any duty.

Sir R. B. Finlay, S.-G. (*Danckwerts* with him), for the Crown.

Cur. adv. vult.

Dec. 15. The following written judgment was delivered by

BRUCE J. In these two cases the instruments are chargeable respectively with stamp duty—in the one case as a deed; in the other case as an agreement—unless the instrument falls within the description of "policy of insurance against

1898

LANCASHIRE INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

VULCAN BOILER AND GENERAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

Bruce J.

accident" given in s. 98 of the Stamp Act, 1891. "Policy of insurance against accident" means, according to that section, "a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury." In substance, I think, there is no distinction to be drawn between the two policies in point of form. I will take the policy in the case of the Lancashire Insurance Company, the form of which is certainly quite as favourable to the appellants as the other policy. The proposal, which is declared in the recital at the commencement of the policy to form the basis of the contract, is described as a proposal "for an indemnity against claims for compensation for personal injury sustained by workmen." The operative part of the policy binds the assurer "to pay for and on behalf of the employer such sums as the employer shall become liable to pay under or by virtue of the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or under or by virtue of the common law, in respect of personal injury caused" in the business carried on by the assured in their business of iron and metal merchants to any workmen in the employ of the assured, or of any sub-contractor, for injury to whose workmen the assured may be answerable. It is quite clear upon the wording of the policy that the payment agreed to be made depends upon the liability of the assured to answer for the death of his workmen, or for the personal injury sustained by his workmen. The death of a workman in the employ of the assured might be caused by other than natural causes, or such workman might sustain personal injury and yet no payment would become due under the policy, unless the death were caused, or the personal injury were caused, in such circumstances as to render the assured liable to pay compensation. The payment, therefore, is not, I think, a payment agreed to be made upon the death of a person otherwise than from a natural cause, or as compensation for personal injury, but is a payment agreed to be made as indemnity against claims for compensation for which the assured is answerable. Two things must happen: there must first be

the death or personal injury of a workman; and, secondly, there must be a liability on the part of the assured to make compensation for the death or personal injury. It was argued by Mr. Cohen in the one case, and by Mr. Jelf in the other, that although the two conditions must exist before the policy could become operative, yet the payment stipulated for by the policy was not the less a payment to be made upon death, or as compensation for personal injury, merely because some other condition than death or personal injury must exist before the policy could be enforced. They instanced the cases of life policies and accident policies, which commonly contain various stipulations requiring certain notices to be given within a stipulated time of the happening of the death or accident, the strict observance of which is made a condition precedent to the right of action on the policy; and they contended that such policies did not cease to be life policies or accident policies by reason of the right of action on the policies depending upon some event other than the death or accident. But the answer to that argument is, I think, this—that the conditions in such cases are incidental to the subject-matter of the insurance. The governing event in those cases is the death or accident, and the ordinary stipulations to which reference was made by the learned counsel are stipulations made with a view to fence round and protect the rights of the assurer, so as to enable him to require satisfactory evidence of, or to make due inquiry concerning, the facts upon which his liability depends. They do not alter the character of the risk upon which the assurance depends. Such conditions grow out of, and are subsidiary to, the subject-matter of the insurance; but it seems to me, in the present case, that the liability of the assured to compensate his workmen lies at the very root of the contract; it is the cardinal event upon which the liability of the assurer to pay the money under the policy depends. It is in truth and substance a contract of indemnity, and although the indemnity is against liability arising from death or personal injury, and the death or personal injury is a sine qua non, and the death or personal injury is one of the conditions of the liability of the assured, yet it is not the condition

1898

LANCASHIRE INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

VULCAN BOILER AND GENERAL INSURANCE COMPANY v. INLAND REVENUE COMMISSIONERS.

upon which the liability of the assurer depends; it is not the condition upon which, by the terms of the instrument, the payment agreed to be made depends. I am, therefore, of opinion that the Crown is entitled to judgment.

WILLS J. I concur in the judgment delivered by my brother Bruce. I only wish to add this: Supposing it possible that the first portion of the definition in the Act of a "policy of insurance against accident" does apply to this policy, and that the policy in that respect could be brought within the definition as being a policy for a payment agreed to be made upon death from accident or violence or otherwise than from a natural cause, I think that the liability under the policy to pay to the master any sum which he may be called upon to pay to a person injured in his employment cannot by any reasonable, or even unreasonable, stretch of language come within the description in the second portion of the policy, "any payment agreed to be made as compensation for personal injury." Those words surely must mean a sum agreed to be paid as some solatium or recompense for personal injury, and they are, in my view, quite impossible to be applied to this policy, whatever may be said about the words in the first portion of the definition. I agree that these appeals should be dismissed.

Judgment for the Crown.

Solicitors for appellants (in the first case): *Bower, Cotton & Bower, for Janion & Hall, Manchester.*

Solicitors for appellants (in the second case): *Busk, Mellor & Norris, for Payne, Galloway & Payne, Manchester.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

W. A.

THE UNITED REALIZATION COMPANY, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

1898
Dec. 15, 16.

Revenue—Stamp Duty—Mortgage—Covenant—Agreement to execute Mortgage—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Sched. I.*

A limited company, by deed, in consideration of 373,000*l.* then advanced to them by a building society, agreed to execute, whenever called upon by the society, a mortgage or charge, in such form as the society should request, of all the company's interest in certain hereditaments to secure the repayment of the sum advanced, with interest. A receiver was appointed by the deed to receive the rents and profits so long as any money remained due to the society; but there was a provision that he was not to enter into possession of such rents and profits until default should be made in payment of the principal and interest:—

Held, that this instrument was chargeable with ad valorem stamp duty under the head "Mortgage, Bond, Debenture, Covenant," in the 1st schedule to the Stamp Act, 1891.

CASE stated by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

On March 16, 1898, an instrument was presented on behalf of the United Realization Company, Limited (the appellants), by their solicitors, to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was under seal and in the following terms:—

"To the Liberator Permanent Benefit Building Society.—In consideration of the sum of 373,374*l.* 15*s.* 7*d.* this day advanced by the Liberator Permanent Benefit Building Society to J. W. Hobbs and Company, Limited (hereinafter called 'the company'), the receipt whereof the company hereby acknowledge, the company hereby undertake and agree whenever called upon by the society to execute at the expense of the company a mortgage or charge of all their interest in the hereditaments and premises known as Albert Gate Mansions, Knightsbridge, Middlesex, and more particularly described in

1898

UNITED REALIZATION COMPANY v. INLAND REVENUE COMMISSIONERS.

an indenture dated May 26, 1892, and made between the company of the one part and the Founders' Stock and Share Trust, Limited, of the other part, in such form as the society shall request to secure the repayment of the said sum of 373,374*l.* 15*s.* 7*d.* and interest at the rate of 7*l.* 10*s.* per cent. per annum payable by equal quarterly instalments, and the company hereby agree with the society that until payment of the said sum of 373,374*l.* 15*s.* 7*d.* they will pay interest on the same, or on so much thereof as shall be due at the rate aforesaid, and the company hereby appoints Joseph George Coldwells, or such other person as the society may hereafter substitute for him, the receiver of the rents and profits of the said hereditaments and premises so long as any money still remains due to the society: Provided always that the said Joseph George Coldwells, or such other person as may hereafter be appointed, shall not enter into possession of such rents and profits until default shall be made in payment of the principal moneys and interest herein referred to within 14 days after the same shall have been demanded. In witness," &c.

It appeared that at the date of the execution of the instrument there were two mortgages subsisting on the property, namely (1.) a legal mortgage, and (2.) an equitable mortgage, and that the title-deeds of the property were held by the first mortgagee.

The commissioners were of opinion that the instrument was liable to duty under the head "Mortgage, Bond, Debenture, Covenant" in the 1st schedule to the Stamp Act, 1891 (1),

(1) The Stamp Act, 1891 (54 & 55 Vict. c. 39).

Sect. 1 provides that the stamp duties to be charged upon the several instruments in the 1st schedule to the Act shall be the several duties specified in the said schedule, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by the Act.

Amongst the instruments specified in the 1st schedule are "mortgage, bond, debenture, covenant (except a marketable security otherwise specially charged with duty) . . . . (1.) being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money"; and ad valorem duties are specified, including the following:—"Exceeding 300*l.*: For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured, 2*s.* 6*d.*"

(3.) "Being an equitable mortgage: For every 100*l.*, and any fractional

and they accordingly assessed the duty at 466*l.* 15*s.*, being at the rate of 2*s.* 6*d.* per cent. upon the sum secured.

The questions for the opinion of the Court were:—

(i.) Whether the instrument was chargeable with the duty of 466*l.* 15*s.* in accordance with the assessment of the commissioners?

(ii.) If not, with what duty the instrument was chargeable?

Pickford, Q.C. (*H. S. Theobald* with him), for the appellants. The instrument in question is not taxable under the head of "Mortgage, Bond, Debenture, Covenant" in Sched. I. of the Stamp Act, 1891; it is chargeable only with a duty of 10*s.* as a deed. It does not create any present charge upon the property; it is only an agreement to execute, in the future, a mortgage or charge in such form as the society shall require. It does not become a charge, either legal or equitable, until the society require the mortgage or charge to be executed: *Ex parte Izard, In re Cook.* (1) In order to ascertain whether a present charge is created, the terms of the document alleged to create it must in each case be looked at: *Shaw* v. *Foster*, judgment of Lord Cairns. (2) The provision for appointing a receiver does not make the instrument a present charge, because until default is made in payment of principal or interest the

---

part of 100*l.*, of the amount secured, 6*d.*"

The schedule also contains: "Covenant for securing the payment or repayment of money, or the transfer or retransfer of stock. See Mortgage, &c."

Sect. 86 of the Act: "(1.) For the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be . . . ."

(2.) "For the purpose of this Act the expression 'equitable mortgage' means an agreement or memorandum, under hand only, relating to the deposit of any title-deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property."

(1) (1874) L. R. 9 Ch. 271.

(2) (1872) L. R. 5 H. L. 321, at pp. 339, 340.

1898

UNITED REALIZATION COMPANY v. INLAND REVENUE COMMISSIONERS.

receiver has no power to act. The instrument is not a "covenant for securing the payment or repayment of money" within the meaning of the 1st schedule. It is at most a covenant to execute a security for the repayment of the money advanced; there is no covenant to repay.

Sir R. B. Finlay, S.-G. (*Danckwerts* with him), for the Crown. This instrument comes under the head "Mortgage" in the 1st schedule of the Act. It is an equitable mortgage or charge, being an agreement to execute a legal mortgage with an intention, to be collected from the terms of it and particularly from the provision for the appointment of a receiver, to create a present charge. The definition of "mortgage" contained in s. 86 of the Act covers this case, because the instrument is a security by way of mortgage for the payment of a definite sum of money advanced. "Mortgage" includes an equitable mortgage by deed, though equitable mortgages under hand are dealt with specially by the Act, and a lower rate of duty is imposed in respect of them. There is no distinction between a mortgage and a charge, except that the person who advances the money has a different mode of enforcing his security. A provision that the borrower shall execute a legal mortgage on demand does not prevent the instrument from creating a present charge, if the intention to create a present charge is apparent, as it is here, from the terms of the instrument. These propositions are supported by reference to the following cases: *Hepworth* v. *Hill* (1); *Dighton* v. *Withers* (2); *Ex parte Izard, In re Cook* (3); *Heath* v. *Pugh* (4); *Cradock* v. *Scottish Provident Institution* (5); *In re Hurley's Estate* (6); *Attorney-General* v. *Worrall* (7); *City of London Brewery Co.* v. *Commissioners of Inland Revenue.* (8)

If the instrument is not taxable under "Mortgage," it is under "Covenant." It is clearly a covenant for securing the repayment of the money advanced. It is also a debenture.

Pickford, Q.C., replied.

(1) (1862) 30 Beav. 476.
(2) (1862) 31 Beav. 423.
(3) L. R. 9 Ch. 271.
(4) (1881) 6 Q. B. D. 345; (1882) 7 App. Cas. 235.
(5) (1893) 63 L. J. (Ch.) 15.
(6) (1894) 1 L. R. Ir. 488.
(7) [1895] 1 Q. B. 99.
(8) [1898] 1 Q. B. 408.

1898

UNITED REALIZATION COMPANY v. INLAND REVENUE COMMISSIONERS.

WILLS J. I think it is clear that the Crown is entitled to our judgment. I do not propose to go minutely through the series of cases which have been brought before us for the purpose of informing our minds, because I think it is much more satisfactory that we should, if we can, extract the clear principle of the decisions rather than undertake the task of commenting upon each case and the expressions of individual judges in it. I agree that the real question here is whether the instrument in question meant to give an immediate charge. With respect to the difference between "mortgage" and "charge," the cases cited by the Solicitor-General, and particularly that of *Heath* v. *Pugh* (1), have satisfied me that there is no distinction to be drawn between "mortgage" and "charge" except in respect to the machinery by which each is enforced. "Mortgage" is a charge enforced with a different sort of machinery—more beneficial to the person who lends the money and is entitled to the benefit of the mortgage—than the machinery by which a charge can be enforced; but, to my mind, the instrument in question is a charge; it is a mortgage; and it constitutes an immediate charge. It is plain, I think, from the cases to which the Solicitor-General called our attention, that the introduction into an instrument of a provision that a demand or request shall be one of the preliminaries to the obligation to execute a deed, does not determine the question whether the instrument creates a present charge or not. That question is to be decided upon perfectly different considerations. If an intention to give a present charge can be collected from the instrument, the introduction of such a provision does not make it the less a present charge; it is only part of the machinery by which the obligation which effects that charge shall be carried out. If, on the other hand, no intention to constitute a present charge can be collected from the instrument itself—as none could in *Shaw* v. *Foster* (2)—then the introduction of words requiring that there must be a demand or request to execute a deed is material, because until the demand has been made, upon which alone the obligation to create anything, or the fact of the creation of anything, in the

(1) 6 Q. B. D. 345; 7 App. Cas. 235. (2) L. R. 5 H. L. 321.

1898

UNITED REALIZATION COMPANY v. INLAND REVENUE COMMISSIONERS.

WILLS J.

nature of a charge must depend, the condition upon which a charge comes into existence is not satisfied. The question, therefore, in this case is whether the parties intended that the instrument should create a present charge. I think it cannot be entirely left out of consideration that the instrument here is the only security given for a sum of over 370,000*l*. To begin with, it is a startling proposition that such a sum was intended by the parties to be advanced without any present or immediate security being given—without any charge which would prevent the property from being misapplied, and the whole of the large sum advanced from being lost. Unless there is something to indicate that the words importing that the further instrument to be executed is only to be executed on demand are meant to postpone the creation of the charge, the natural inference, and especially so where a very large sum is advanced, would be that the parties intended that there should be a present, operative, and physical security given for the repayment of the money. It was argued for the appellants that the instrument before us was in effect only a covenant to give a charge, and that where there is a covenant simply to give a charge it is a strong proposition to say that a charge has already been created, because the covenant would give that which had already been given. In my opinion that argument leaves out of consideration some very material words in the covenant. It is a covenant not merely to give a charge, but to give a charge "in such form as the society," who advanced the money, "shall request." Those words supply a reason why, there being a present charge created, the obligation to execute a deed should be imposed. It is imposed for the protection of the persons who have advanced the money, in order to enable them to perfect their charge, and make it more operative by inserting any further protective provisions which they may think necessary. I think, therefore, that the sting is taken out of the argument that this instrument is merely a covenant to create a charge. Further, looking at the whole of the instrument, I cannot help thinking that the provision for the immediate appointment of a receiver is important, and indicates the intention to create a present charge, although no

doubt the provision—an ordinary one in a receivership deed—that the receiver shall not interfere unless the money, or some of it, is owing and has been demanded and not paid renders the argument of less strength than in a case where a receiver is appointed without that qualification, as in *Cradock* v. *Scottish Provident Institution.* (1)

For these reasons I come to the conclusion that this instrument is a mortgage; it is an equitable mortgage, and one which does not fall within the definition in sub-s. 2 of s. 86. It is, therefore, subject to the duty which the commissioners have fixed.

But, if I am wrong in the view which I have stated, there is another view which appears to me equally, if not more, conclusive. This is certainly a covenant, and, to my mind, it is "a covenant for securing the payment or repayment of money." In this case it is for the repayment of the money advanced. There is no other security for the repayment except this document, and it would, I think, be an extravagant construction of the phraseology used if one were to narrow the meaning so as to make the expression a mere synonym for "a covenant to repay the money." The words are used for the purpose of creating a duty in aid of the revenue, and unless there is some obvious reason—such as was pointed out in the case of equitable mortgages by deposit of title-deeds—why a smaller duty, or no duty, should be imposed upon one description of subject-matter rather than another, I cannot conceive why, because the only security is a covenant to do something which will effectually protect the money, that covenant is not a covenant in the nature of a primary security for the repayment of the money just as much as if it were an actual covenant to repay. A covenant to repay would probably be valueless, or comparatively valueless, and it seems to me an extravagant proposition to say that a far more effectual security—namely, a covenant to assign property—is not a covenant or security for the repayment of money.

I am, therefore, of opinion that the instrument in question falls under the description both of "mortgage" and of

(1) 63 L. J. (Ch.) 15.

1898

UNITED REALIZATION COMPANY v. INLAND REVENUE COMMISSIONERS.

"covenant" for the purpose of the Stamp Act, 1891, and as such is liable to the duty which has been demanded in respect of it.

BRUCE J. I am content to rest my opinion upon the single point that this instrument is a covenant, being a security for the repayment of money. That it is a covenant is beyond doubt, and it seems to me impossible to contend that it was not intended to be, and did not in fact operate as, a security for the repayment of money. It was contended by Mr. Pickford that it did not operate as a security, because it could not become operative as a charge until demand was made. But even assuming that he was well founded in that contention, still I think a covenant that gives me a right to a charge on my making a demand for the charge is still a security. The very circumstance that I have a covenant from my debtor to give me a charge if I demand it, even though it may not constitute a charge until the demand is made, yet does at once operate as a security. The right that I possess by virtue of the covenant to demand a charge does in itself, I think, constitute a security. Suppose a promissory note payable on demand, or payable fourteen days after demand, to be deposited for a loan, is it to be said that that promissory note would not constitute a security? I think that such a document as that—a mere promise to pay on demand, or fourteen days after demand—would constitute a security; and much more so would a covenant.

Judgment for the Crown.

Solicitors for appellants: *Thorne & Welsford.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

W. A.

C. A.
1899
Jan. 17.

[IN THE COURT OF APPEAL.]

SHIPWAY *v.* BROADWOOD.

Principal and Agent—Agreement by Agent with Third Party to Detriment of Principal—Surreptitious Dealing with other Principal—Bribe accepted by Agent—Avoidance of Contract.

The defendant agreed to purchase a pair of horses from the plaintiff, provided they were passed as sound by a veterinary surgeon who was employed by the defendant to examine them. The horses were certified as sound by the veterinary surgeon, and the defendant sent a cheque for the price. The horses were delivered and found to be unsound, and thereupon they were returned and the cheque stopped. In the course of the trial of an action on the cheque it was elicited that the veterinary surgeon had accepted a bribe from the plaintiff:—

Held, that it was immaterial to inquire what effect the bribe had on the mind of the defendant's agent, that the offer and acceptance invalidated the certificate, and that the plaintiff could not recover under the contract which depended on the validity of the certificate.

Appeal from a judgment of Day J. at the trial of the action without a jury.

It appeared that the defendant was desirous of purchasing a pair of horses, and employed a veterinary surgeon of the name of Pinkett to look out for a pair, and promised him a commission on the price. Pinkett reported that the plaintiff, a horse-dealer, had a pair of horses; and the defendant thereupon wrote to the plaintiff agreeing to purchase the horses for 200*l.* provided that Pinkett passed them as sound, and employed Pinkett to examine them. Pinkett gave a certificate that the horses were sound, and the defendant sent a cheque for the price to the plaintiff, and the horses were delivered. On their arrival the defendant was of opinion that they were not sound, and he employed another veterinary surgeon to examine them, who pronounced them to be unsound. The defendant thereupon stopped the cheque and returned the horses. The plaintiff sued on the cheque.

At the trial the first witness called for the plaintiff was Pinkett, and in the course of his cross-examination he admitted

C. A. 1899

SHIPWAY v. BROADWOOD.

that he was to be paid for his certificate in addition to the commission he was to receive on the price paid for the horses; he also admitted that the plaintiff had offered him a sum of money if the horses were sold, and that he had accepted the offer. It did not appear what amount was offered, and Pinkett was not asked whether he had actually received the money. There was no re-examination of the witness as to the offer or the amount. The plaintiff was also a witness, and was cross-examined as to the offer of money to Pinkett. No point was raised as to the invalidity of the certificate given by Pinkett owing to his transaction with the plaintiff, and the learned judge was not asked to give judgment on this point for the defendant. Judgment was given for the plaintiff for the amount of the cheque.

The defendant appealed.

Amphlett, Q.C., and *H. G. Farrant* (with them *Corner*), for the defendant. There ought either to be judgment entered for the defendant or a new trial. Dealing first with the latter point, there should be a new trial on the ground of surprise, as the point as to the receipt of a bribe by Pinkett was raised for the first time in cross-examination.

The main contention is that there should be judgment for the defendant. The objection is that the certificate of Pinkett was valueless because he accepted a bribe from the plaintiff. This point was not taken at the trial, but it comes within the ruling of Bramwell L.J. in *Borrowman* v. *Free* (1), as an objection taken for the first time in the Court of Appeal, but which could not have been met by evidence had it been taken at the trial.

There was a surreptitious dealing between the plaintiff and the agent of the defendant which entitles the defendant to have the contract rescinded: *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (2) The agreement to give a bribe was corrupt whatever was the actual effect on the mind of the person bribed: *Harrington* v. *Victoria Graving Dock Co.* (3)

(1) (1878) 48 L. J. (Q.B.) 65, at p. 68. (2) (1875) L. R. 10 Ch. 515.
(3) (1878) 3 Q. B. D. 549.

Witt, Q.C., and *J. B. Matthews*, for the plaintiff. There is no ground for the application on the ground of surprise, and there are not sufficient materials on which judgment can be entered for the defendant. The matter was not followed up at the trial, and it does not appear when the offer was made, whether before or after the sale, nor that any money was received, nor what the amount was. It might have turned out to be so trivial that it should be disregarded. In the case of an arbitrator, the mere possibility of his mind being influenced is sufficient to avoid his award; but in a case like the present the inquiry should be whether in fact the agent's mind was influenced by the offer made to him.

In *Smith* v. *Sorby*, reported in a note to *Harrington* v. *Victoria Graving Dock Co.* (1), Blackburn J. in his judgment clearly indicates that the actual biassing of the mind of the agent to whom money was given is necessary to constitute fraud on the part of the person who gives it.

A. L. SMITH L.J. This is an appeal from a judgment of my brother Day. The action was brought on a cheque of the defendant's for 200*l.*, and judgment was given for the plaintiff. The reason suggested for a new trial—that of surprise—affords no ground for the application, for there is no surprise within the meaning of the rule. The main question is whether on the facts there was such evidence that we ought to enter judgment for the defendant.

It appears that the plaintiff is a horse-dealer, and that the defendant was desirous of buying a pair of horses, and he instructed a veterinary surgeon of the name of Pinkett to look out for them. He heard through Pinkett of a pair in the hands of the plaintiff, and he employed Pinkett to examine the horses and give a certificate as to their soundness, and there can be no doubt that the purchase of the horses by the defendant of the plaintiff was made on the certificate of Pinkett. The defendant agreed if Pinkett passed the horses as sound to purchase them. They were certified as sound by Pinkett, and the defendant sent a cheque for their price; but on their being

(1) 3 Q. B. D. 549, at p. 552.

C. A. 1899

SHIPWAY v. BROADWOOD.

A. L. Smith L.J.

sent to his house he was of opinion that they were both unsound, and that view was confirmed by a veterinary surgeon who was called in. Thereupon the horses were sent back and the cheque stopped.

At the trial of the action the defences set up by the defendant failed, because it was clear that he had agreed to buy the horses if they were passed by Pinkett, and they were so passed. Pinkett, however, was called as the first witness for the plaintiff, and he was cross-examined as to the commission he was to receive from the defendant and as to the charge for his certificate. During his cross-examination it came out that he had been offered money by the plaintiff and had accepted the offer. Under these circumstances, can his certificate stand? It has been argued that the evidence does not shew that Pinkett was bribed; but in my opinion it is impossible to give any other meaning to the evidence of Pinkett and that of the plaintiff. The plaintiff said to Pinkett, "If you sell these horses for me I will give you a sum of money." This evidence is conclusive to my mind that the plaintiff offered a bribe to Pinkett if he would certify that the horses were sound, and this he did. There was no re-examination of the witnesses upon this point. The very least that can be said as to what occurred when this offer was made is that it was assented to, and that is sufficient to vacate the certificate and the sale which depended on that certificate. It is remarkable that when this evidence came out in cross-examination, counsel for the defendant did not treat it as a defence to the claim, or ask the learned judge to give him judgment. We have to give the judgment which should have been given at the trial, and we must enter judgment for the defendant; but under the circumstances there will be no order as to the costs of this appeal.

CHITTY L.J. I am of the same opinion. Upon the evidence I have arrived at the same conclusion as the Lord Justice. It is clear that a promise or offer of a sum of money was made by the plaintiff, the seller of the horses, and was accepted by Pinkett, the agent of the defendant, and that the plaintiff was aware of the position in which Pinkett stood in relation to

the buyer. Under these circumstances it is not necessary to embark on the inquiries suggested by the counsel for the plaintiff. Directly it is established that money was paid or promised to the agent of the other party, it is quite unnecessary to go further and see what effect that had on the mind of the person to whom it was paid or to be paid. The plaintiff placed Pinkett in a position in which his duty conflicted with his interest. In *Thompson* v. *Havelock* (1) Lord Ellenborough said, "No man should be allowed to have an interest against his duty." That great principle has been applied in cases innumerable, and it has never been held to be a proper subject of inquiry what was the effect on the mind of the recipient of the bribe. In my opinion there was ground for saying upon the evidence that the payment was actually made to Pinkett. If it was intended to bring the matter within the maxim "De minimis non curat lex," it was necessary for the plaintiff's counsel to shew by re-examination that the amount was trivial; but that was not done. It was the plaintiff's duty to inform the defendant of the promise made to Pinkett if he wished to escape the consequences of having made it. I wish to state again emphatically that in such a case as this it is an immaterial inquiry to what extent the bribe or the offer of it influenced the person to whom it was given or offered. A contrary doctrine would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe; and, further, the real evil is not the payment of money, but the secrecy attending it.

COLLINS L.J. I am of the same opinion. The plaintiff cannot succeed in this action without relying on the certificate given by Pinkett, and the question is whether he can rely on it. Pinkett was designated by the buyer as the person on whose opinion the sale of the horses depended, and the objection to the validity of his certificate is that he was promised by the seller a sum of money if the horses were sold. I take it to be clear law that a principal who has placed the agent of the other party to the contract in such a position as that

(1) (1808) 1 Camp. 527.

C. A. 1899

SHIPWAY v. BROADWOOD.

Collins L.J.

in which Pinkett was placed is debarred from relying on a certificate given by the agent. There is a personal incapacity on his part to maintain any action based on the decision of the agent. I infer from the evidence without hesitation that money was offered by the plaintiff, and that the offer was accepted by Pinkett; indeed, I go further, because I think that it was received by him, and that the offer and acceptance or receipt occurred at a time when the plaintiff knew the position of Pinkett as agent for the defendant. I agree, therefore, that the judgment for the plaintiff cannot stand.

Appeal allowed.

Solicitors for plaintiff: *Smiles & Co., for William Boycott, Hereford.*

Solicitors for defendant: *Black & Moss, for Nevinson & Barlow, Malvern.*

A. M.

C. A. 1899 *Jan.* 14.

[IN THE COURT OF APPEAL.]

MELLOR *v.* TOMKINSON & CO.

Employer and Workman—Compensation for Injury by Accident—Employment — Building not exceeding Thirty Feet in Height — Machinery — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

The Workmen's Compensation Act, 1897, applies to employment on, in, or about a building on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof, although the building does not exceed thirty feet in height.

APPEAL from the decision of a county court judge upon a claim for compensation under the Workmen's Compensation Act, 1897.

The respondent claimed compensation from the appellants for injury caused to him by an accident which arose out of and in the course of his employment by them. The accident occurred while the respondent was employed upon a building which was being constructed by the appellants. Machinery driven by mechanical power was being used for the purpose of

the construction of the building when the accident happened, but the building was not then thirty feet in height. The county court judge held that the Workmen's Compensation Act, 1897, applied, and proceeded to award compensation to the respondent. (1)

Clavell Salter, for the appellants. The building, on which the respondent was employed when the accident happened, not exceeding thirty feet in height, the Act does not apply. In the case of employment on buildings the Act only applies when the building exceeds thirty feet in height. The true construction of s. 7, sub-s. 1, is that the words "which exceeds thirty feet in height" govern all that follows. Therefore the sub-section excludes from the operation of the Act all buildings not exceeding thirty feet in height. It only includes three classes of buildings, namely, buildings exceeding that height, (1.) which are being constructed or repaired by means of a scaffolding, (2.) which are being demolished, (3.) on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof.

Pickford, Q.C., and *Segar*, for the respondent, were not called upon.

A. L. SMITH L.J. I am of opinion that this appeal must be dismissed. I think that the true construction of the sub-section is that the words "which exceeds thirty feet in height" are to be read only with the words "and is either being constructed or repaired by means of a scaffolding, or being demolished"; and that the antecedent to the subsequent words "or on which machinery driven by steam, water, or other mechanical power,

(1) The Workmen's Compensation Act, 1897, s. 7, sub-s. 1, provides, "This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers, as hereinafter defined, on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof."

C. A. 1899

MELLOR v. TOMKINSON & Co.

is being used, &c.," is simply the word "building." Therefore, if machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition of the building, it need not exceed thirty feet in height in order that the Act may apply.

CHITTY L.J. Upon the grammatical construction of the sub-section, I have no hesitation in saying that in my opinion the case comes within the Act. I agree that the words "which exceeds thirty feet in height" apply only to a building which "is either being constructed or repaired by means of a scaffolding, or being demolished," and that they do not apply to a building "on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof." I gather from the sub-section that the Legislature considered that, where a building, in the course of construction or repair by means of a scaffolding, or of demolition, exceeds thirty feet in height, that in itself involves danger to the workman employed upon it, and that another and distinct class of buildings also involves such danger, namely, buildings which are being constructed, repaired, or demolished by means of machinery of the kind described in the sub-section.

COLLINS L.J. concurred.

Appeal dismissed.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*

Solicitors for respondent: *Crowders & Vizard, for G. Lynskey, Liverpool.*

E. L.

THE WEST LANCASHIRE RURAL DISTRICT COUNCIL, Appellants; OGILVY, Respondent.

1899 *Jan.* 17.

Local Government—Local Authority—Supply of Water to House—Owner—Expenses—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 62—*Public Health* (*Water*) *Act*, 1878 (41 & 42 *Vict. c.* 25), *s.* 3.

By the Public Health Act, 1875, s. 62, a local authority may, under certain conditions, require the owner of a house within their district to obtain a supply of water to his house, and in default of his compliance may themselves do the necessary work and recover the expenses from him. By the Public Health (Water) Act, 1878, s. 3, a rural sanitary authority may, where a house within their district has not within a reasonable distance from it a supply of water, and they think that such supply can be brought within a reasonable distance at a cost not exceeding certain specified limits of amount, require the owner to provide such supply within a reasonable distance of his house, and in default of his compliance may themselves execute the necessary works, and recover the cost from him:—

Held, that s. 3 of the later Act did not apply to limit the amount of the expenses which the local authority might recover against the owner in proceedings under s. 62 of the earlier Act.

Case stated under the Summary Jurisdiction Acts by four justices of the county of Lancaster sitting as a court of summary jurisdiction.

The respondent was summoned before the justices, upon the complaint of the appellants, to shew cause why an order should not be made for payment by him to the appellants of the sum of 6*l.* 10*s.* 5*d.*, being the balance of expenses incurred by them in executing works for obtaining and furnishing a supply of water to premises of which he was the owner.

The following material facts were admitted upon the hearing of the summons:—

The appellants are the local authority, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), for the rural sanitary district of West Lancashire, and the respondent is, and was at the time of the happening of the events hereinafter stated, the owner of a dwelling-house and farm, known as Shortwood Hall, situate at Tarleton within the district.

1899

WEST LANCASHIRE RURAL COUNCIL v. OGILVY.

In 1897 the appellants, acting under the powers of the Public Health Act, 1875, provided a supply of water for a portion of their district, and in order to provide a supply for the respondent's premises they laid, in a public footpath in the township of Tarleton, a branch main or pipe to a point about 293 yards from Shortwood Hall. Such branch main or pipe was connected with other mains forming part of the appellants' water system, and by means of such mains water could on October 5, 1897, have been furnished to Shortwood Hall had it been connected with such mains and pipes by means of service pipes and the necessary fittings thereto.

By an order made in June, 1897, the Local Government Board, in pursuance of s. 8 of the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), duly fixed a general scale of charges for the compulsory supply of water to houses within the area of that part of the West Lancashire Rural Sanitary District which comprises the township of Tarleton, and determined and declared that the charge for a supply of water according to the scale so fixed should be deemed to be a reasonable cost within the meaning of s. 62 of the Public Health Act, 1875.

On October 5, 1897, the appellants' surveyor examined Shortwood Hall, and found that it was without a proper supply of water.

The appellants, being satisfied on the report of their surveyor that Shortwood Hall was without a proper supply of water, and that such supply could be furnished thereto by them at a cost not exceeding the scale of charges authorized by the order of the Local Government Board, duly gave notice to the respondent requiring him, in pursuance of the provisions of the Public Health Act, 1875 (1), within fourteen days from the service of

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 62: "Where on the report of the surveyor of a local authority it appears to such authority that any house within their district is without a proper supply of water, and that such a supply of water can be furnished thereto at a cost not exceeding the water rate authorized by any local Act in force within the district, or where there is not any local Act so in force at a cost not exceeding twopence a week, or at such other cost as the Local Government Board may, on the application of the local authority, determine under all the circumstances of the case to be reasonable, the local authority shall give notice in writing to the owner, requiring him, within a

such notice, to obtain a proper supply of water for his house, and to do all such works as might be necessary for that purpose, and provide and lay down a branch pipe from the appellants' main and affix a tap thereto on his premises.

The respondent having failed to comply with such notice, the appellants themselves executed the works specified therein at a cost of 19*l.* 10*s.* 5*d.* On a demand being made upon the respondent for payment of that sum, he paid to the appellants the sum of 13*l.* as being, in his opinion, the maximum an owner could be required to pay. The sum of 13*l.* was the maximum which could be charged under s. 3 of the Public Health (Water) Act, 1878. (1)

The justices dismissed the summons, being of opinion that the effect of s. 3 of the Public Health (Water) Act, 1878, was that the appellants were not entitled to recover from the respondent a greater amount than 13*l.*

---

time therein specified, to obtain such supply, and to do all such works as may be necessary for that purpose.

"If such notice is not complied with within the time specified, the local authority may, if they think fit, do such works and obtain such supply . . . . And any expenses incurred by the local authority in doing any such works may be recovered in a summary manner from the owner of the premises. . . ."

(1) The Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 3: "It shall be the duty of every rural sanitary authority . . . . . to see that every occupied dwelling-house within their district has within a reasonable distance an available supply of wholesome water sufficient for the consumption and use for domestic purposes of the inmates of the house.

"Where it appears to a rural sanitary authority, on the report of their inspector of nuisances, or their medical officer of health, that any occupied dwelling-house within their district has not such supply within a reasonable distance, and the authority are of opinion that such supply can be provided at a reasonable cost not exceeding a capital sum the interest on which at the rate of five per centum per annum would amount to twopence per week, or at such other cost not exceeding a capital sum the interest on which at the rate of five per centum per annum would amount to threepence per week, as the Local Government Board may on the application of the local authority determine under all the circumstances of the case to be reasonable, and that the expense of providing the supply ought to be paid by the owner or defrayed as private improvement expenses, proceedings may be taken as follows": (after certain notices to be given to the owner of the houses and failure on his part to comply with such notices, the authority may themselves provide the supply, and recover from the owner in a summary manner the expenses incurred by them in so doing).

1899

WEST LANCASHIRE RURAL COUNCIL v. OGILVY.

The question for the opinion of the Court was whether or not the justices' decision was right.

R. Cunningham Glen, for the appellants. The justices were wrong in thinking that s. 3 of the Public Health (Water) Act, 1878, applied to limit the expenses which the local authority might recover where they have taken proceedings under s. 62 of the Public Health Act, 1875. Sect. 3 of the later Act has not repealed s. 62 of the earlier Act: *Colne Valley Water Co.* v. *Treharne.* (1) Sect. 3 applies to limit the amount of the expense of bringing a supply of water within reasonable distance of premises, whilst s. 62 applies to the cost of connecting the premises with the mains. Whether the supply has been brought within reasonable distance is a question within the discretion of the local authority, subject only to an appeal to the Local Government Board under s. 268 of the Public Health Act, 1875.

Macmorran, Q.C., for the respondent. Sect. 62 of the Public Health Act, 1875, only applies where there is a water supply within a reasonable distance of the house. The case should be sent back to the justices to decide whether on the facts the expense of bringing the water to the respondent's house ought to be charged upon him—i.e., whether a supply of water has been brought within a reasonable distance of his house.

LAWRANCE J. I do not think we can send this case back to the justices for them to decide whether the water supply was brought within a reasonable distance of the respondent's house. It seems now to be admitted that the contention to which they gave effect was wrong. If that be so, if s. 3 of the Act of 1878 does not, as I think that it does not, apply to limit the amount of expenses which the local authority may recover in proceedings under s. 62 of the Act of 1875, then the owner's remedy, where his complaint is that the water supply has not been brought within reasonable distance of his house, is to appeal to the Local Government Board under s. 268. I am, therefore, of opinion that the appellants are entitled to our judgment.

(1) (1884) 50 L. T. (N.S.) 617.

CHANNELL J. In my view s. 62 of the Act of 1875 assumes that there is a water supply within reasonable distance of the house. When that is the case the section provides for the owner paying the cost of communication to his own house. Sect. 3 of the Act of 1878 applies to a different state of things, namely, to the bringing of the supply within a reasonable distance of the house. In substance the effect of the two sections is that the owner is made liable for the cost of connecting his house with the mains, and also for the cost of bringing new mains within reasonable distance of the house; but in the latter case there is a limitation of the cost which he can be required to pay. The result seems to be that if the owner be required by the local authority to connect with his house mains which are at an unreasonable distance from it, his only remedy is an appeal to the Local Government Board. I am of opinion that the justices were wrong in deciding that the expense which the respondent could be required to pay was limited to 13*l.*, and I think the case must go back for them to order him to pay the additional 6*l.* 10*s.* 5*d.*

Judgment for appellants.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Dickinson, Ormskirk.*

Solicitors for respondent: *Paterson, Snow, Bloxam & Kinder, for Wilson, Wright & Wilsons, Preston.*

W. A.

C. A.
1898
Dec. 20.

[IN THE COURT OF APPEAL.]

STRICKLAND *v.* WILLIAMS.

Bond—Condition not to Commit Breach of Injunction — Enumeration of Prohibited Acts—Condition depending on one Event—Liquidated Damages —Order XIV., *r.* 1.

A bond was executed by the defendant for the payment of 100*l.* to the plaintiff. The condition of the bond was that if the defendant should at all times thereafter, in obedience to a perpetual injunction granted by the High Court of Justice, refrain from trespassing on the plaintiff's lands therein mentioned, or the walls, gates, or fences thereof, or inclosing the same, and from pulling down or removing or otherwise injuring the same, or inciting others to commit any such trespasses, the obligation should be void. The defendant committed a breach of the injunction:—

Held, that the condition of the bond depended on one event only, namely, a breach of the injunction, and that the sum secured by the bond was a liquidated sum, to the recovery of which the procedure of Order XIV., r. 1, was applicable.

APPEAL from an order of a judge at chambers on a summons under Order XIV., r. 1, allowing the plaintiff to sign judgment for the amount secured by a bond of the defendant.

It appeared that an injunction had been obtained in the High Court to restrain the defendant from trespassing on land of the plaintiff. The defendant disobeyed the injunction, and was committed to York Castle. He there executed a bond in favour of the plaintiff in the sum of 100*l.* The condition of the bond set out the fact that an injunction had been granted and followed its terms. It was: "If the said Francis Haydn Williams after his release from York Castle aforesaid shall from time to time and at all times hereafter (in obedience to a perpetual injunction granted by the High Court of Justice, Queen's Bench Division, contained in an order in an action of *Strickland* v. *Williams*, dated the 9th day of March, 1891) refrain from trespassing on the said Sir Charles William Strickland's land, garden, or lodge, in the township of Hawsker-cum-Stainsacre, in the county of York, and known as the Abbey

House, and the Abbey House lodge and garden, and the lands on which stand the ruins of Whitby Abbey, or the walls, gates, or fences thereof or inclosing the same, and from pulling down or removing or otherwise injuring the same or any part thereof, or inciting others to commit any such trespasses, then the above-written bond or obligation shall be void; otherwise the same shall remain in full force and virtue."

The defendant was released from York Castle, and some time after he again trespassed on the lands mentioned in the injunction and pulled down part of a fence. This action was brought to recover the sum of 100*l.* as money due under the bond, and an application was made under Order XIV., r. 1. Channell J. made an order that the plaintiff should be at liberty to sign judgment for 100*l.*

The defendant appealed.

Lister Drummond, for the defendant. The bond falls within 8 & 9 Will. 3, c. 11, s. 8, and the plaintiff should have proceeded under that statute. Order XIV. is not applicable in such a case: *Tuther* v. *Caralampi*. (1) The bond is conditioned for the performance of many different things, and the damage in respect of breaches may be quite different in the different cases. Several breaches can be assigned, and it is a case in which the payment of the sum is dependent on the occurrence of one or more or all of several events, and the presumption is that the parties intended the sum to be penal: *Elphinstone* (*Lord*) v. *Monkland Iron and Coal Co.* (2) Had the bond been merely conditioned not to commit a breach of the injunction the case might have been different; but the recital of the fact that there was an injunction does not detract from the force of the condition that the defendant is to abstain from doing certain specified things. [He cited *Gerrard* v. *Clowes* (3) and *Tall* v. *Ryland*. (4)]

William Graham, for the plaintiff. The bond is not within the statute of William III., for there is no "covenant or agreement in any indenture, deed or writing contained." The bond

(1) (1888) 21 Q. B. D. 414.
(2) (1886) 11 App. Cas. 332.
(3) [1892] 2 Q. B. 11.
(4) (1670) 1 Ch. Cas. 183.

C. A. 1898

STRICKLAND v. WILLIAMS.

was not intended to secure compensation for any damage that the defendant might do; but the condition under which he was let out of gaol was that he should pay 100*l.* if he disobeyed the injunction. [He cited *Roy* v. *Beaufort* (*Duke of*) (1) and *Law* v. *Redditch Local Board.* (2)]

Lister Drummond, in reply. The bond is a deed, and the action is for non-performance of the agreement contained in it. It comes, therefore, within the statute of William III., and is a case in which a jury ought to assess the damages.

A. L. SMITH L.J. An application was made under Order XIV., and the master allowed the plaintiff to sign judgment, and his order was affirmed by the learned judge. The defendant appeals, and says that Order XIV. cannot be worked against him because there are clauses in the bond which bring it within the statute 8 & 9 Will. 3, c. 11, and breaches would have to be assigned on them. As to this, I am clearly of opinion that this is not a bond for non-performance of a covenant or agreement contained in a deed or writing within the statute. There is no covenant or agreement for non-performance of which the 100*l.* is agreed to be paid.

The next point argued was whether the 100*l.* was a penal sum or liquidated damages; in the latter case Order XIV. could be applied, whereas if it was a penalty it could not.

We have been told the circumstances under which the bond was given, namely, to enable the defendant to get out of prison. We are entitled to look at the surrounding circumstances in order to construe the bond; but without their aid I cannot read the bond without seeing that its object was to secure obedience to the injunction that had been obtained against the defendant. If he obeyed the injunction he would not be called on to pay; but if he disobeyed it he was to be liable under the bond.

In my opinion, it is the law that where payment is conditioned on one event the payment is in the nature of liquidated damages; but where it is conditioned on more than one

(1) (1745) 2 Atk. 190.

(2) [1892] 1 Q. B. 127.

event it is in the nature of a penalty. This bond depends on one event only—that is disobedience to the injunction. The order appealed from was, therefore, right, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. The case comes back to this one point—whether the 100*l.* mentioned in the bond is in the nature of liquidated damages or of a penalty. If it is a penalty, the defendant would be in no worse position, and the landowner in no better position, than before the bond was made. If the defendant had trespassed and been sued, the jury might have given exemplary damages even for a trivial act of trespass if they were satisfied that there had been a wanton breach of the injunction. That being so, we must suppose that the bond was intended to have some effect, and I should have thought, without looking at the surrounding circumstances, that its effect was that the defendant was not to commit any breach of the injunction, and that if he did he must pay 100*l.* as liquidated damages. Apart from any doctrine of law, it would be idle for the defendant to say that he could have gone to equity and obtained relief. I can see no reason whatever why equity should have given him any relief. The case is not within the statute of William III.; and, when once we see that, there is no reason why this money should not be recovered as money due under the procedure which has been applied to the case.

COLLINS L.J. I am of the same opinion. On investigation of the bond it turns out not to be within the statute of William III. This is an important consideration, because if it were the statute gives rather more than the mere actual damage, because it gives a right to a judgment which can be used as a security in the case of further breaches. It may be that the statute went a good deal further than the Courts of Equity would have gone; but it is not applicable, and we have to consider whether this sum, which is called a penalty in the bond, is not in fact liquidated damages, and not a penalty in the proper sense of the word. I agree that in this sum the parties have assessed

C. A. 1898

STRICKLAND v. WILLIAMS.

the amount payable on failure to comply with one event, and that being so, Order XIV. applies.

Appeal dismissed.

Solicitors for plaintiff: *Radford & Frankland, for Buchanan & Sons, Whitby.*

Solicitor for defendant: *Percy Noël.*

A. M.

1899 *Jan.* 17.

PEASE AND OTHERS *v.* LOWDEN AND OTHERS.

Municipal Corporation—Resignation of Office—Office when vacant—Outgoing Alderman—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 36, *sub-ss.* 1 *and* 2; *s.* 60, *sub-s.* 3.

Resignation of his office by a borough alderman in the manner provided by s. 36, sub-s. 1, of the Municipal Corporations Act, 1882, will not render the office vacant until it is declared to be vacant by the borough council with the formalities prescribed by sub-s. 2; and, consequently, an alderman, who in the course of rotation is about to go out of office under s. 14, sub-ss. 6 and 7, cannot by merely resigning his office before the ordinary day of election of aldermen, and in the absence of a declaration by the council that the office is vacant, get rid of his disqualification to vote at the election of aldermen under s. 60, sub-s. 3.

CASE stated under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882.

1. The 9th day of November, 1898, was the ordinary day of election of aldermen of the borough of Pontefract, and on that day one-half of the whole number of aldermen for the borough were, pursuant to s. 14, sub-ss. 6 and 7, of the Municipal Corporations Act, 1882, to go out of office and their places were to be filled by election. The three aldermen who were thus to go out of office were Thomas Wordsworth, George Grandidge, and, subject to the question hereinafter raised, Joseph Taylor.

2. At five o'clock in the afternoon of November 8, 1898, the said Joseph Taylor paid to the town clerk the fine provided for

non-acceptance of office, and delivered to him a paper in the words and figures following :—

"St. Catherine's, Pontefract.
"Nov. 8, 1898.

"Dear Mr. Sangster,

"I hereby give you notice that I resign my position in the Pontefract Town Council, inclosing a cheque for the amount of fine consequent upon my resignation.

"Yours sincerely,
"Joseph Taylor."

3. No meeting of the council had been called by the mayor or requisitioned by members of the council for either the 8th or 9th of November, 1898. No such meeting was held on either of the said days. The quarterly meeting of the council was duly held at noon on November 9, 1898.

4. On November 4, 1898, a summons to attend the said quarterly meeting was duly delivered at the usual place of abode of each councillor. Such summons specified the business proposed to be transacted at the said quarterly meeting to be as follows :—

The election of mayor.
The election of three aldermen.
The appointment of—
(1.) Returning officers.
(2.) Monthly and quarterly council meetings.
(3.) Committees.

5. No business was transacted or attempted to be transacted at the said quarterly meeting other than that specified in the summons. The council did not before or at the said quarterly meeting declare the office of alderman, which the said Joseph Taylor had resigned or purported to resign, vacant, nor did the council signify the same by notice in writing signed by three members of the council and countersigned by the town clerk and fixed on the town hall.

6. The first business transacted at the said quarterly meeting was the election of mayor. The said Joseph Taylor was duly elected mayor and accepted office, and made and subscribed

1899

PEASE v. LOWDEN.

the required declaration. Thereupon the said Joseph Taylor as mayor became and was the chairman of the said quarterly meeting.

7. There being no sheriff in the borough, the election of aldermen was held immediately after the election of mayor.

8. At the said election of aldermen the candidates for the three vacancies were respectively the three petitioners and the three respondents.

9. At the said election the aldermen and councillors entitled to vote to the number of twenty-one voted by signing and delivering to Joseph Taylor the chairman voting papers, and he added to the said voting papers so delivered a voting paper signed by himself and containing, or purporting to contain, one vote for each of the respondents.

10. Upon counting the votes contained in all the said voting papers it was found that eleven votes (including the votes of the said Joseph Taylor) purported to be given to each of the respondents and eleven votes to each of the petitioners. Thereupon the said Joseph Taylor gave, or purported to give, a casting vote in favour of each of the respondents, and declared each of them to be elected.

11. If the said Joseph Taylor was not entitled to vote at the said election on the ground that he was "an outgoing alderman" within the meaning of s. 60, sub-s. 3, of the said Act, then the lawful votes for the various candidates would have been eleven votes for each of the petitioners, and ten votes for each of the respondents.

The question for the Court is whether upon the facts stated the said Joseph Taylor was entitled to vote at the said election.

Robson, Q.C., and *S. H. Day*, for the petitioners. Taylor had no right to vote at the election, for he was an outgoing alderman, and by s. 60, sub-s. 3, of the Municipal Corporations Act, 1882, an outgoing alderman, although mayor elect, is prohibited from voting at the election of aldermen. The fact that he had resigned his office and paid the fine did not render his office vacant, for the borough council had not complied

1899

PEASE v. LOWDEN.

with the formalities required by s. 36, sub-s. 2. (1) And until his office was vacant he could not cease to be an outgoing alderman.

Jelf, Q.C., and *Ernest Jelf*, for the respondents. Taylor was not an outgoing alderman on November 9. By s. 61, sub-s. 3, an outgoing alderman may vote at the election of mayor. But here Taylor could not have voted at the election of mayor on that date. He had already resigned his office on November 8, and had thereby parted with his right to vote for a mayor. That resignation was irrevocable. In *Reg.* v. *Corporation of Wigan* (2) it was held that the resignation of the office of councillor is completed by the delivery of the writing to the town clerk and the payment of the fine, and cannot afterwards be withdrawn even with the assent of the corporation. But if the resignation was complete, the office must have been vacant. There cannot be a tertium quid. The object of s. 60 is to regulate the votes at the election of aldermen. But at the date of that election Taylor had, quâ alderman, no vote to regulate.

Robson, Q.C., in reply. Disqualification for discharging the functions of an office does not ipso facto cause the office to be vacant. In *Reg.* v. *Mayor, &c., of Welchpool* (3) it was held under s. 52 of 5 & 6 Will. 4, c. 76, which provides that a councillor who becomes bankrupt or compounds with his creditors "shall thereupon immediately become disqualified and shall cease to hold the office of such councillor, and the

(1) By the Municipal Corporations Act, 1882, s. 36, sub-s. 1, "A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof."

Sub-sect. 2: "In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council and countersigned by the town clerk, and fixed on the town hall, and the office shall thereupon become vacant."

By s. 60, which is headed "Election of Aldermen"—

Sub-sect. 3: "An outgoing alderman, although mayor elect, shall not vote."

By s. 61, which is headed "Election of Mayor"—

Sub-sect. 3: "An outgoing alderman may vote, although the person for whom he votes is an alderman."

(2) (1885) 14 Q. B. D. 908.

(3) (1876) 35 L. T. (N.S.) 594.

1899

PEASE v. LOWDEN.

council thereupon shall forthwith declare the office void, and shall signify the same by notice . . . . and the said office shall thereupon become void," that the office did not become void until there had been a public declaration to that effect. If the contention of the respondents were right, it would always be open to any outgoing alderman, who was likely to be elected mayor, to defeat the object of s. 60 by resigning his office of alderman just before the election, when it was too late to get the office filled up.

WRIGHT J. In this case it seems clear that on the morning of November 9 Mr. Taylor was in the position of a person who had resigned his office, but whose office was, notwithstanding such resignation, not vacant in the sense that an election could have been held to fill it. Sect. 36, sub-s. 1, of the Municipal Corporations Act, 1882, provides that "a person elected to a corporate office may at any time by writing signed by him and delivered to the town clerk resign the office on payment of the fine provided for non-acceptance thereof." And by sub-s. 2, "In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council and countersigned by the town clerk, and fixed on the town hall, and the office shall thereupon become vacant." In *Reg.* v. *Corporation of Wigan* (1), where a councillor had resigned his office in the manner prescribed by sub-s. 1, but the council had not declared the office to be vacant under sub-s. 2, it was held that the resignation was irrevocable; but what the Court ordered the corporation to do was, not to hold a fresh election, but to declare the office vacant. Having regard to the form of the order in that case and to the plain language of sub-s. 2, I think it is clear that the effect of resignation is merely to debar the party resigning from continuing to act in the office, and not to make the office vacant. The office remains full, and there can be no election to fill it up until the council have first declared it to be vacant.

Then what is the effect of this upon s. 60, which deals with the election of aldermen? In that election "an outgoing alder-

(1) 14 Q. B. D. 908.

man, although mayor elect, shall not vote." The question is, what is the meaning of the words "outgoing alderman"? Mr. Jelf has contended that in one sense Mr. Taylor was not an outgoing alderman, because he had resigned the office and was consequently no longer capable of acting in it; that s. 60 was intended to regulate the way in which persons who had votes should exercise their right of voting, and that, as Mr. Taylor had no longer any vote as an alderman, he was not within the prohibition of the section. But I do not think that that is a reasonable construction to put upon the section. When the section speaks of outgoing aldermen it seems to refer to a class of persons, and, if any one is within that class and has not succeeded in getting rid of his office so as to create a vacancy, I think he must be within the prohibition.

BRUCE J. I am of the same opinion.

Judgment for the petitioners.
Leave to appeal refused.

Solicitors for petitioners: *Sharpe, Parker & Co., for Carter, Atkinson & Bentley, Pontefract.*

Solicitors for respondents: *Day, Russell & Co.*

J. F. C.

1899
Jan. 18, 19, 20.

CORNFORD *v.* CARLTON BANK, LIMITED.

Malicious Prosecution—Action against Corporation—Liability.

An action for malicious prosecution will lie against a corporation. *Edwards* v. *Midland Ry. Co.*, (1880) 6 Q. B. D. 287, followed.

ACTION tried before Darling J. without a jury.

The plaintiff, a married woman, was the owner of a shop at Hastings. The defendants were a limited company who lent money. They lent 5*l.* to a person named Gower, for whom the plaintiff's husband became surety. Gower made default in repayment of the loan, and the defendants obtained judgment against the plaintiff's husband as surety, issued execution, and seized goods in the plaintiff's shop. The plaintiff claimed the goods, and an interpleader issue was tried in the county court, in which judgment was given in favour of the plaintiff. Afterwards a charge was preferred by an agent of the defendants against the plaintiff for conspiring with her husband and Gower to defraud the defendants. This charge was heard before the borough magistrates, and, after a remand, was dismissed. The evidence at the trial of the present action was sufficient to satisfy the learned judge that the prosecution was instituted without reasonable and probable cause, and that the defendants were, in directing the prosecution, acting with malice, in the sense that they were actuated by such motives as would be malice in law were they the motives of a private person.

P. Rose Innes, and *John Hunt*, for the defendants. An action for malicious prosecution cannot lie against a corporation aggregate, for the corporation has no mind, and is incapable of malice or motive, whereas affirmative proof of malice is necessary to support the action. This was the view expressed by Alderson B. in *Stevens* v. *Midland Counties Railway* (1), and by Lord Bramwell in *Abrath* v. *North Eastern Railway* (2) in the House of Lords. The latter judgment was based mainly

(1) (1854) 10 Ex. 352. (2) (1886) 11 App. Cas. 247.

on this point. These authorities ought to be followed in preference to the ruling of Fry J. on further consideration in *Edwards* v. *Midland Railway*. (1) The point as to whether a corporation can be liable for actual malice was suggested in the Court of Appeal in *Nevill* v. *Fine Arts and General Insurance Co.* (2), but not decided, and appears to have been treated as an open question. In the same case in the House of Lords (3) the point was not raised.

Marshall Hall, Q.C., and *T. M. Stevens*, for the plaintiff. *Edwards* v. *Midland Railway* (1) is an express decision that the action will lie, and the expressions of opinion in the other cases, which are relied on as authorities on behalf of the defendants, were unnecessary for the decisions, and amount to nothing more than obiter dicta. In *Abrath* v. *North Eastern Railway* (4) Lords Selborne and FitzGerald expressly guarded themselves against assenting to the opinion of Lord Bramwell. The point was not argued in the House of Lords, nor was *Edwards* v. *Midland Railway* (1) referred to.

[The following cases were also cited: *Henderson* v. *Midland Railway* (5); *Kemp* v. *Courage & Co.* (6)]

Jan. 20. The following written judgment was delivered by

DARLING J. This is an action to recover damages against the defendants, on the ground of malicious prosecution without reasonable and probable cause.

The trial took place before me, without a jury, on the 18th and 19th of this month.

As I have not to sum up the evidence to a jury, it is sufficient for me to say that I am satisfied the prosecution instituted against the plaintiff and her husband and Gower was without reasonable and probable cause, and that the defendants were, in directing that prosecution, acting with malice, in the sense that they were actuated by such motives as would be malice in law, were they the motives of a private person. In my notes

(1) 6 Q. B. D. 287.
(2) [1895] 2 Q. B. 156.
(3) [1897] A. C. 68.
(4) 11 App. Cas. 247.
(5) (1871) 24 L. T. (N.S.) 881.
(6) (1890) 7 Times Rep. 50; S.C. nom. *Kent* v. *Courage & Co.*, 55 J. P. 264.

1899

CORNFORD v. CARLTON BANK.

Darling J.

of the evidence will be found, I think, ample justification for this opinion.

It was contended on behalf of the defendants by Mr. Rose Innes, their counsel, that no action for malicious prosecution can lie against a limited company or corporation, because malice cannot be imputed to them. The following authorities were cited: *Stevens* v. *Midland Counties Railway* (1), *Edwards* v. *Midland Railway* (2), *Abrath* v. *North Eastern Railway* (3), *Kemp* v. *Courage & Co.* (4), *Nevill* v. *Fine Arts and General Insurance Co.* (5), and *Henderson* v. *Midland Railway.* (6) I understand the judgment of the learned judge in *Edwards* v. *Midland Railway* (2) as being a direct authority that such an action as this one would lie against the present defendants. In that case Fry J. (as he then was) delivered his considered judgment after further consideration of a case tried before him at assizes. The judgment of Fry J. appears to me in direct conflict with the judgment of Alderson B. in *Stevens* v. *Midland Counties Railway* (1); but it is to be observed that the other Barons of the Exchequer, Platt and Martin BB., expressly guarded themselves against deciding that such an action as this cannot lie against a corporation aggregate, declaring it to be unnecessary to decide that question in that particular case. The observations of Alderson B., therefore, appear to me to be obiter dicta. This cannot be said of the ruling of Fry J. in the case cited.

The decision of the House of Lords in *Abrath* v. *North Eastern Railway* (3) was given in 1886, six years after the judgment of Fry J. in *Edwards* v. *Midland Railway.* (2) The latter case was not cited in the case of *Abrath* v. *North Eastern Railway* (3), nor was the decision of the point now in question necessary in that case, as was expressly stated by the Lord Chancellor and Lord FitzGerald. Yet Lord Bramwell took that occasion to deliver a judgment which, were it binding upon me, would oblige me to determine this case in favour of

(1) 10 Ex. 352.
(2) 6 Q. B. D. 287; 50 L. J. (Q.B.) 281.
(3) 11 App. Cas. 247.
(4) 7 Times Rep. 50.
(5) [1895] 2 Q. B. 156; affirmed [1897] A. C. 68.
(6) 24 L. T. (N.S.) 881.

the defendants. For the opinion of Lord Bramwell on any matter of law it is impossible not to entertain the highest respect; but I confess that in this instance his reasoning appears to me inconclusive. He admits that a corporation may be liable for the malicious publication of a libel, but says a corporation is incapable of "actual malice," holding, therefore, that they are capable of implied malice—that is, of malice implied by law. But this is to say that the law will declare a certain thing—malice in a corporation—cannot possibly exist, and then will proceed to imply it. To state the matter thus seems to me sufficient to shew that the distinction attempted between malicious libel and malicious prosecution, as within the competency of corporations or companies, is founded on fallacy.

The judgments of Alderson B. and of Lord Bramwell proceeded upon the ground that a corporation aggregate has not a "mind," and, therefore, cannot entertain malice. If malice in law were synonymous with *malice* in French—a sort of *esprit* tinged with ill nature—I should entirely agree. In such a sense a corporation would be as incapable of malice as of wit. But of malice—actual malice—in a legal sense, I think a corporation is capable.

My judgment, therefore, is for the plaintiff, and I assess the damages at 100*l*.

In case there should be an appeal from my decision, I may refer to the case of *Bank of New South Wales* v. *Owston* (1) as not without bearing on this question.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. H. Waugh, for H. G. Phillips, Hastings.*

Solicitor for defendants: *S. J. Debenham.*

(1) (1879) 4 App. Cas. 270.

P. B. H.

1899
Jan. 20.

THE QUEEN *v.* POWELL AND ANOTHER, OVERSEERS OF UPTON BISHOP. *Ex parte* WILLIAMS.

Local Government—Assistant Overseer—Right to Rate-books—Appointment—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-s.* 1.

When the overseers of a parish have expressed their intention of collecting the rates themselves, but the parish council have by resolution appointed an assistant overseer, the Court will grant a mandamus to the overseers to deliver to the assistant overseer the rate-books and all other books in their custody as overseers, for the purpose of enabling him to perform the duties of his office.

Semble, the appointment of overseers and assistant overseers under s. 5, sub-s. 1, of the Local Government Act, 1894, is complete by election by the parish council, and no document is required beyond a minute of the appointment.

RULE NISI calling upon Thomas Albert Powell and John Smith, overseers of the poor of the parish of Upton Bishop, in the county of Hereford, to shew cause why a writ of mandamus should not issue directed to them commanding them to deliver to Richard Williams, the duly appointed assistant overseer of the said parish of Upton Bishop, the rate-books and all other books in their custody as such said overseers, to enable him to perform the duties of his office.

It appeared from the affidavits that on April 16, 1898, at the meeting of the newly elected parish council for the parish of Upton Bishop, the appointment of the then assistant overseer was by resolution of the council determined, and that at a meeting on April 23 T. A. Powell and John Smith were appointed overseers of the parish. At a meeting of the parish council, held on May 5, the resolution of April 16 revoking the appointment of the assistant overseer was confirmed, and Mr. T. A. Powell announced his intention, in conjunction with the other overseer, to collect the rates. At a meeting held on May 20 a resolution was carried, "That Mr. Richard Williams be appointed assistant overseer at a salary of 14*l.* a year." At

1899

REG. v. POWELL. WILLIAMS, *Ex parte.*

a meeting on July 18 the following resolution was carried: "That the overseers, in the opinion of this council, be directed to deliver up the rate-books, precepts, and other papers to Mr. Richard Williams, the duly appointed assistant overseer, to enable him to perform the duties of his office."

The overseers persisted in their intention of collecting the rates themselves, and declined to deliver up the books. They relied on a communication dated July 15, 1898, from the Local Government Board, in which the board expressed their opinion that, "If the overseers decide to collect the rates, they are entitled to the custody of the books for that purpose, and the parish council would not be empowered to give any directions to the contrary." Williams then obtained this rule nisi. (1)

Corner (*A. S. Poyser* with him) shewed cause against the rule. The assistant overseer has no rights, as he has not been duly appointed. Assistant overseers were originally appointed under 59 Geo. 3, c. 12, s. 7, by the justices after being elected by the vestry. They were appointed under the hands and seals of at least two justices of the peace, and they were authorized to execute such duties of the office of overseer of the poor as should be expressed in the warrant for their appointment. By s. 5 of the Local Government Act, 1894, the power of appointing an assistant overseer was transferred to and vested in the parish council, but the mode of appointment is not altered. A parish council is a body corporate by s. 3, sub-s. 9, and as in this case an instrument under seal is requisite for the appointment of an assistant overseer, the formalities prescribed by that

(1) By the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3, sub-s. 9, "Every parish council shall be a body corporate by the name of the parish council, with the addition of the name of the parish . . . . and any act of the council may be signified by an instrument executed at a meeting of the council, and under the hands, or if an instrument under seal is required, under the hands and seals, of the chairman presiding at the meeting and two other members of the council."

By s. 5, sub-s. 1, "The power and duty of appointing overseers of the poor, and the power of appointing and revoking the appointment of an assistant overseer for every rural parish having a parish council, shall be transferred to and vested in the parish council. . . ."

1899

REG. v. POWELL. WILLIAMS, *Ex parte.*

sub-section ought to have been complied with, and the appointment should, in order to be valid, have been made under the hands and seals of the chairman presiding at the meeting and two other members of the council. It is not sufficient that there should be, as here, a mere minute of the resolution appointing the assistant overseer. Williams has nothing either to shew his appointment or to define his duties: *Mayor of Ludlow* v. *Charlton* (1); *Austin* v. *Guardians of Bethnal Green.* (2) But, even if the assistant overseer has been duly appointed, he has no right as against the overseers to compel them to hand over to him the custody of the rate-books if they decide, as they have done here, to collect the rates themselves. The office of overseer carries no remuneration, and a person is indictable for refusing to accept it; but, in order to ameliorate the conditions of the position, the Legislature has given to the overseers assistance by means of a salaried officer. The overseers are, however, responsible for the due performance of these duties, and it is clear that, if they choose to do so, they may dispense with the assistance of an assistant overseer and perform the duties of the office themselves.

Reg. v. *Overseers of Christchurch* (3) is distinguishable, as there the question was raised, not by an assistant overseer, but by a poor-rate collector who was appointed by the overseers, and the Court held that by so doing they had transferred from themselves and imposed upon him the duty of collecting the rate. That is not the case here, where the overseers are ready and willing to collect the rate, and they have not appointed and do not desire the appointment of an assistant overseer. There is no power in the parish council which is the creation of the Local Government Act, 1894, either to add to or to take from the duties of the overseers.

A. T. Lawrence, Q.C. (*Daniell* with him), in support of the rule. The assistant overseer is entitled to the possession of the rate-books, not exclusively as against the overseers, but for the purpose of enabling him to carry out the duties of his office.

(1) (1840) 10 L. J. (Ex.) 75. (2) (1874) L. R. 9 C. P. 91.
(3) (1857) 27 L. J. (M.C.) 23.

By electing Williams to be assistant overseer, the parish council must be taken to have impliedly required him to perform all the duties of an overseer: *Skingley* v. *Surridge*. (1) The overseers cannot dictate to the parish council whether there shall or shall not be an assistant overseer. The parish council have the right to appoint such an officer, and it follows that when appointed he must perform the duties of his office, and the overseers have no right to prevent him from so doing. No doubt the overseers have also a right to the possession of the rate-books. That is not disputed; but they have no exclusive right as against the assistant overseer. The rate-books and all other books are vested in the parish council by s. 17, sub-s. 7, of the Local Government Act, 1894, and the resolution of the council of July 18 is therefore operative. *Reg.* v. *Overseers of Christchurch* (2) is precisely in point, and is a decision of the Exchequer Chamber.

[CHANNELL J. It seems clear that an assistant overseer has a right of access to the books; but is this gentleman the duly appointed assistant overseer?]

That point is not really raised by the affidavits; but, assuming that the only appointment is by the resolution of May 20, that is sufficient to constitute a valid appointment. There is a minute of the resolution signed by the chairman, and there is nothing in the Local Government Act, 1894, which requires that the appointment should be under seal.

[LAWRANCE J. The appointment of the overseers seems to have been made in precisely the same way.]

Yes. It is not necessary in order to constitute a valid appointment that any document of appointment should be executed. By s. 189 of the Public Health Act, 1875, urban authorities have power to appoint officers, and it has been held that the appointment of such officers is complete by election, and no document in writing is required beyond a minute of the appointment: Lumley's Public Health Act, 4th ed. p. 241.

[CHANNELL J. I think that this gentleman is entitled to have the books for the performance of his duties; but he must not exclude the overseers from them, otherwise they in turn

(1) (1843) 11 M. & W. 503. (2) 27 L. J. (M.C.) 23.

1899

REG. v. POWELL. WILLIAMS. *Ex parte.*

will be entitled to require him to hand them over. The form of the mandamus must be moulded accordingly.]

The rule only asks that he should have them "to enable him to perform the duties of his office."

[CHANNELL J. We think it had better run, "for the purpose of enabling him to perform the duties of the said office." The result will be that, so long as he wants them for that purpose, he can have them, and at other times the overseers can have them.]

THE COURT (Lawrance and Channell JJ.), without delivering any judgments, made the rule absolute in this form.

Rule absolute.

Solicitors for overseers: *Bennett & Co., for Corner & Co., Hereford.*

Solicitor for assistant overseer: *S. Gissing Skelton, for Adams, Ross.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1899
Jan. 24.

NORTON AND ANOTHER *v.* DAVISON.

Sale of Goods—Oral Contract—Part Payment—Statute of Frauds, s. 17—*Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4, *sub-s.* 1.

Where, upon an oral contract for the supply of goods, it was a term of the contract that a sum of money which had been overpaid to the vendor upon a previous sale of goods by him to the purchaser should be retained by the vendor on account of the price of the goods contracted to be supplied:—

Held, that there was not a part payment which would satisfy the provisions of s. 4, sub-s. 1, of the Sale of Goods Act, 1893.

Walker v. *Nussey*, (1847) 16 M. & W. 302, followed.

APPEAL from the judgment of a Divisional Court (Wright and Darling JJ.) reversing the judgment of the judge of the Westminster County Court.

The action, which was originally brought in the High Court and remitted therefrom to the county court, was for a balance due in respect of the price of certain cabinets manufactured for the defendant by the plaintiffs, who carried on business under the firm of Norton & Steele as builders and decorators. It appeared from the county court judge's notes that in March, 1897, the defendant ordered from the plaintiffs six stationery cabinets at 4*l.* 7*s.* 6*d.* each. He then paid on account 5*l.* On April 2 the plaintiffs delivered two of the cabinets and were paid 5*l.* The plaintiffs were then overpaid by 1*l.*, the price of the two cabinets being 8*l.* 15*s.*, and 5*s.* having been due to them for some other work. On April 10 the plaintiffs delivered two more of the cabinets and were paid 8*l.* 15*s.* for them, the defendant through some inadvertence not taking credit for the 1*l.* overpaid. On May 7 the plaintiffs delivered the last two cabinets, and received 8*l.* 15*s.* for them, thus remaining overpaid by 1*l.* On that date a conversation took place between the plaintiff Steele and the defendant, which, according to the evidence of the former, was to the following effect. The defendant ordered twelve more cabinets at the same price as

C. A. 1899

NORTON v. DAVISON.

before. The plaintiff Steele thereupon said that it was a big order, and he should like something on account; and the defendant then said that the plaintiffs had been paid for the other cabinets and already had 1*l.*; and it was thereupon agreed between them that the amount by which the plaintiffs had been overpaid should go on account for the further goods. The defendant denied that he had given the order for twelve cabinets. The defendant had refused to take the cabinets when made. It was contended for the defendant that there was no evidence of the contract sued upon to satisfy the provisions of the Sale of Goods Act, 1893, s. 4, sub-s. 1, which substantially re-enacts the provisions of the 17th section of the Statute of Frauds. The county court judge found that the account of the transaction given by the plaintiff Steele was correct, but held that the requirements of the statute were not satisfied, the contract being merely oral, and there being no part payment within the meaning of the statute. He therefore gave judgment for the defendant.

The Divisional Court reversed his judgment.

Lewis Thomas, for the defendant. There was no such part payment in this case as would satisfy the 17th section of the Statute of Frauds, and s. 4, sub-s. 1, of the Sale of Goods Act, 1893. Where there is no memorandum in writing, the statute requires something besides the mere oral contract to render the contract enforceable. Here there was nothing besides the mere oral contract. There was not a subsequent agreement by which the sum overpaid was appropriated to goods delivered under the contract. The evidence only admits of the conclusion that the agreement for that appropriation was contemporaneous with the acceptance of the order and formed part of the contract for the sale of the goods. The case of *Walker* v. *Nussey* (1) is exactly in point, and in that case it was held that the Statute of Frauds was not satisfied.

G. Thorn Drury, for the plaintiffs. It is submitted that there was upon the facts a part payment here sufficient to satisfy the statute. The case of *Walker* v. *Nussey* (1) is dis-

(1) 16 M. & W. 302.

tinguishable, for there it did not appear that the debt due from the plaintiff was extinguished by the agreement. The arrangement was merely that it should be extinguished by the delivery of the goods sold. There could not therefore be said to have been a part payment for the goods. It is submitted that in the present case the effect of the agreement is that the liability of the plaintiffs for the overpayment of 1*l.* was to be wiped out, and the amount of it to be appropriated to the new order, just as if the money had been paid to the defendant and by him handed back to the plaintiffs in part payment of the price of the goods to be supplied. It cannot be necessary that there should be an actual payment and repayment of the 1*l.*

Lewis Thomas, for the defendant, was not called on to reply.

EARL OF HALSBURY L.C. I regret that I cannot agree with the decision of the Divisional Court. There appears from the notes of the evidence and the findings of the learned county court judge thereon to be no doubt as to the facts of this case. Prior to May 7, 1897, the defendant had ordered certain cabinets of the plaintiffs, which had been duly delivered at various times, and on that day the defendant gave the plaintiffs a further order for an additional number of cabinets. What passed on that occasion was in substance as follows. On receiving the order the plaintiff Steele said that it was a large one, and that he should like something on account; and thereupon the defendant said that the plaintiffs had been overpaid on the previous order to the extent of 1*l.*; and I will take it that, as was argued, the effect of what took place was that it was then agreed that the sum of 1*l.*, which the plaintiffs had already received, should be appropriated to the new order and retained by them as part payment of the price of the cabinets then ordered by the defendant. On these facts the question becomes a dry question of law, namely, whether under the circumstances there has been that which will satisfy the requirements of the 17th section of the Statute of Frauds, or rather of the provisions of the Sale of Goods Act, 1893, which have now taken its place. I am clearly of opinion that there has not. It

C. A. 1899

NORTON v. DAVISON.

Earl of Halsbury L.C.

is not, as it appears to me, very material to consider the policy of the statute. It is enough that the Legislature has provided that, in the case of the sale of goods of the value of 10*l.* or upwards, the contract shall not be enforceable unless either there is a memorandum of it in writing signed by the party to be charged, or his agent, or the buyer accepts part of the goods and actually receives the same, or gives something in earnest to bind the contract or in part payment. The effect clearly is that, where there is no memorandum of the contract in writing, there must be something done in addition to the making of the oral contract in affirmance of the bargain thereby made. The question in this case, therefore, is whether, where there is only an oral contract for the sale of goods of a value exceeding the amount mentioned in the statute, and something which has passed is by a term of that oral contract to be treated as part payment for the goods, the provisions of the statute are satisfied, and a party to the contract may sue upon it by virtue of the mere oral term therein contained without anything actually done which, apart from the contract itself, may testify to its existence. I think that, if such a construction were given to the statute, its provisions would be rendered idle. The intention of the statute obviously being that mere words of mouth should not be sufficient to establish a contract for the sale of goods exceeding the prescribed value, but that something besides should be necessary for that purpose, it would be wholly inconsistent with its provisions to hold that a plaintiff may rely on a mere oral term of the contract as satisfying the requirements of the statute. The view of the statute which we are taking is exactly that which was taken in the case of *Walker* v. *Nussey*. (1) I think that it would be a very rash undertaking after the lapse of half a century to overrule the opinion of the eminent judges who decided that case, which appears to me to be precisely in point. For these reasons I think the appeal must be allowed.

A. L. SMITH L.J. I am of the same opinion. The case appears to be exactly covered by the judgment of the Court of

(1) 16 M. & W. 302.

Exchequer in *Walker* v. *Nussey* (1), which has never been impugned.

CHITTY L.J. I agree, and will only add the following observations. It appears clear from the evidence as stated on the county court judge's notes and his findings that, upon the oral contract being made for the sale of the goods which exceeded 10*l.* in value, it was a superadded term of the contract itself that the sum previously overpaid to the plaintiffs should be retained by them and appropriated to the price of the goods contracted to be sold. It is plain that the provisions of the Statute of Frauds and those of the Sale of Goods Act, 1893, which correspond to them, require that, in the absence of a writing, there should be something in addition to the mere oral contract, namely, acceptance and receipt of the goods, or something given in earnest to bind the contract, or part payment, in order to make the contract enforceable. Therefore, where the existence of the supposed part payment depends upon a term of the oral contract itself, the statute is not satisfied. I think it would be repealing the provisions of the statute to say that there was a part payment which satisfied the statute in this case.

Appeal allowed.

Solicitors for plaintiffs: *Ransom & Williams.*

Solicitors for defendant: *Ashurst, Morris, Crisp & Co.*

(1) 16 M. & W. 302.

E. L.

1899
Jan. 25.

STAREY, Appellant *v.* GRAHAM, Respondent.

Patent—Patent Agents—Registration—Validity of Rules—Saving of Rights Acquired—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), s. 101, *and* 1888 (51 & 52 *Vict.* c. 50), ss. 1, 27—*Register of Patent Agents Rules*, 1889 *and* 1891—*Patent Rules*, 1890.

The Register of Patent Agents Rules, 1889, are valid and in force; and therefore a patent agent who has been bonâ fide in practice prior to the passing of the Patents, Designs, and Trade Marks Act, 1888, and who is consequently entitled under s. 1, sub-s. 3, of that Act to be registered as a patent agent, must pay before registration the fee prescribed by those rules.

The right which a person had prior to the passing of the Patents, Designs, and Trade Marks Act, 1888, to practise as a patent agent and describe himself as such, is not a "right acquired" which is saved from the operation of the Act by s. 27.

Case stated by a metropolitan police magistrate.

The respondent, who was the secretary and registrar of the Chartered Institute of Patent Agents, preferred an information against the appellant charging him with knowingly describing himself as a patent agent without having been registered as such under the Patents, Designs, and Trade Marks Act, 1888.

It was proved that the appellant had bonâ fide practised as a patent agent for many years before the passing of the Patents, Designs, and Trade Marks Act, 1888, and that he had described himself as a patent agent. A certificate of the Board of Trade was produced stating, in accordance with sub-s. 3 of s. 1 of that Act, that the appellant was entitled to be registered as a patent agent, and it was proved that the appellant had been told by the respondent that he could be registered at any time on payment of the fee prescribed by the Patent Agents Rules, 1889, but that he continued to practise as a patent agent and had not been registered.

The magistrate convicted the appellant, and stated this case for the opinion of the Court.

Muir Mackenzie (*Samuel Green* with him), for the appellant. The magistrate was wrong. The appellant, having proved to

1899

STAREY v. GRAHAM.

the satisfaction of the Board of Trade that prior to the passing of the Patents, Designs, and Trade Marks Act, 1888, he had been bonâ fide practising as a patent agent, is entitled to be registered as a patent agent without having to pay any fee. No doubt the Board of Trade had power given them by s. 1, sub-s. 2, of the Act to make rules, and in 1889 they made rules which prescribed a fee for registration. If those rules were still operative the appellant would be bound by them: *Institute of Patent Agents* v. *Lockwood* (1); but they have been expressly repealed by rule 81 of the Patent Rules, 1890, and there is now no rule in existence which authorizes the exaction of a fee for registration. No doubt the Patent Rules, 1891, refer to the Rules of 1889 as if they were still in existence, but that is not sufficient to re-enact them. In order to re-enact a repealed rule the provisions of s. 101, sub-s. 4, of the Patents, Designs, and Trade Marks Act, 1883 (2), must be complied with, and the

(1) [1894] A. C. 347.

(2) By the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 101, sub-s. 4, "Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or if not, then as soon as practicable after the beginning of the then next session of Parliament. . . . ."

By the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), "Whereas it is expedient to amend the Patents, Designs, and Trade Marks Act, 1883, hereinafter referred to as the principal Act . . . ."

Sect. 1, sub-s. 1: "After the first day of July, 1889, a person shall not be entitled to describe himself as a patent agent, whether by advertisement, by description on his place of business, by any document issued by him, or otherwise, unless he is registered as a patent agent in pursuance of this Act.

"(2.) The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time make such general rules as are in the opinion of the Board required for giving effect to this section, and the provisions of section one hundred and one of the principal Act shall apply to all rules so made. . . . .

"(3.) Provided that every person who proves to the satisfaction of the Board of Trade that prior to the passing of this Act he had been bonâ fide practising as a patent agent shall be entitled to be registered as a patent agent in pursuance of this Act.

"(4.) If any person knowingly describes himself as a patent agent in contravention of this section, he shall be liable on summary conviction to a fine not exceeding twenty pounds."

By s. 27, ". . . . Nothing in this Act shall affect the validity of any act done, right acquired, or liability incurred before the commencement of this Act."

By rule 5 of the Register of Patent Agents Rules, 1889, made by the

1899

STAREY v. GRAHAM.

rule which it is sought to re-enact must be laid before both Houses of Parliament. There was no evidence before the magistrate that this had been done, and the repealed rules cannot be re-enacted by a mere reference in the Rules of 1891, even if the latter rules were themselves laid before both Houses. The rules only acquire statutory validity by the strictest compliance with the prescribed conditions. The appellant's rights were expressly dealt with by s. 27 of the Patents, Designs, and Trade Marks Act, 1888, which provides that nothing in the Act shall affect the validity of any right acquired before the commencement of the Act. The appellant had before the commencement of the Act acquired a right to the name of patent agent, and to practise as a patent agent: *Hough* v. *Windus*. (1)

H. Sutton, and *Corrie Grant*, for the respondent, were not called upon to argue.

Board of Trade, and dated June 11, 1889, "A person who is desirous of being registered in pursuance of the Act, on the ground that prior to the Act he had been bonâ fide practising as a patent agent, shall produce or transmit to the Board of Trade a statutory declaration" [in the form provided] ". . . . Upon the receipt of such statutory declaration . . . . the Board of Trade shall transmit to the registrar a certificate that the person therein named is entitled to be registered in pursuance of the Act, and the registrar shall on receipt of such certificate cause the name of such person to be entered in the register."

By rule 26, "The fees set forth in Appendix C to these rules shall be paid in respect of the several matters . . . . therein mentioned."

By Appendix C, "For registration of name of patent agent who had been bonâ fide in practice prior to the passing of the Act—On application and before registration—5*l*. 5*s*."

By rule 81 of the Patent Rules, 1890, made by the Board of Trade, and dated March 31, 1890, "All general rules heretofore made by the Board of Trade under the Patents, Designs, and Trade Marks Acts, 1883 to 1888, and in force on March 31, 1890, shall be and they are hereby repealed as from that date. . . . ."

By rule 1 of the Register of Patent Agents Rules, 1891, made by the Board of Trade, and dated November 18, 1891, "From and after the commencement of these rules all the duties and powers of the Institute of Patent Agents under the Register of Patent Agents Rules, 1889 (hereafter in the present rules referred to as 'the Rules of 1889'), shall be transferred to and vested in the Chartered Institute of Patent Agents, and the Rules of 1889 shall, where applicable and save so far as they are altered by the present rules, have effect with the following modifications."

(1) (1884) 12 Q. B. D. 224.

1899

STAREY v. GRAHAM.

LAWRANCE J. In my opinion the magistrate was right. Two questions are raised by the case. First, whether the appellant had acquired a right to the description "patent agent," under 51 & 52 Vict. c. 50, s. 27, from the fact of his having bonâ fide used that description for many years before that Act came into force; and, secondly, whether the Rules of 1889 were repealed by the Rules of 1890, and, if so, whether the Rules of 1891 revived them by reference; and it is further asked whether it was necessary if the Rules of 1889 had been repealed and were re-enacted that the provisions of 46 & 47 Vict. c. 57, s. 101, sub-s. 4, should have been complied with.

Now, it is clear that before the Act there was no necessity for registration. Then comes the Act of Parliament, which provides that for the future persons who desire to act as patent agents must be registered. The Act, however, preserves the rights of those who, prior to the passing of the Act, had bonâ fide carried on the business of patent agents, and it provides that such persons shall be entitled to be registered as patent agents. I think what was meant was this—that a person who proves to the satisfaction of the Board of Trade that he had been bonâ fide practising as a patent agent prior to the passing of the Act, has a right to be registered as a patent agent without having to satisfy such conditions as by the rules made under the Act became necessary for those who after the passing of the statute desired to become patent agents. The contention of the appellant is, as I understand it, that the right reserved to him by the statute was a right to be registered without the necessity of paying any fee for such registration. I do not think that that is so.

The second question is whether the Rules of 1889 are still in existence, or whether they have been repealed. It is possible that for a time they were repealed—probably by inadvertence. For some period, from March 31, 1890, to a date in 1891, it certainly seems as if there were no rules applicable to the registration of patent agents at all. But the question we have to decide is whether the Rules of 1891 did revive the Rules of 1889.

By the Rules of 1891, "From and after the commencement

1899

STAREY v. GRAHAM.

Lawrance J.

of these rules all the duties and powers of the Institute of Patent Agents under the Register of Patent Agents Rules of 1889 (hereafter in the present rules referred to as 'the Rules of 1889'), shall be transferred to and vested in the Chartered Institute of Patent Agents, and the Rules of 1889 shall, where applicable, and save so far as they are altered by the present rules, have effect with the following modifications." Then the rules proceed to lay down certain slight modifications of the Rules of 1889. There is no doubt, in my mind, that the Rules of 1889 were re-enacted by the Rules of 1891. Whether the requirements of s. 101, sub-s. 4, of 46 & 47 Vict. c. 57, have been complied with I do not know; but, in my opinion, they were virtually complied with, and I think, therefore, that the Rules of 1889 are valid and in force. The effect of that is that the conviction was, in my opinion, right, and must be upheld.

CHANNELL J. I am of the same opinion. I think it is really a very clear case. There is only one point in it that seems to me to be in any way of general importance, and about which it is really necessary to say anything. In the Act of 1888 there was for the first time a restriction put on persons who desired to practise as patent agents. Down to that time anybody who liked might practise as a patent agent; but then a restriction was imposed, and it was provided that nobody should be entitled to describe himself as a patent agent unless he had first been registered. Power is given to the Board of Trade to make rules for giving effect to the provision, and then it is said that persons who have been in the habit of practising as patent agents before the Act was passed are to have certain privileges. That is a very ordinary form of legislation—to give to people who have been and are in fact doing something which for the first time is forbidden by an Act, privileges over those who have not been doing so. Then, at the end of the Act, there is a saving clause of a very common and ordinary form, and it is because there has been a question raised as to the meaning of that clause that it seems to me that our present decision has some general application. That clause says, "Nothing in the Act shall affect the validity of any act done

right acquired, or liability incurred before the commencement of this Act." It is suggested that the phrase "right acquired" nullifies altogether the whole Act so far as regards persons who have been in practice as patent agents down to the commencement of the Act. The answer to that seems to me to be that "right acquired" means some specific right which in one way or another has been acquired by an individual, and which some persons have got and others have not got. It does not mean "right" in the sense in which it is often popularly used. In one sense, no doubt, every one has a right to do that which the law does not forbid. Every one has a right to wear spectacles, for instance, but he does not acquire a right to wear them by the fact that he does wear them. He is only doing something which the law does not forbid; and if a law were passed forbidding people to wear spectacles, everybody would stand in precisely the same position whether they had in fact been wearing them before the Act or not. If a person has been wearing them he has done so, not because he had acquired a right to wear them, but merely because the law had not forbidden him to do so. In the same way, before the passing of this Act anybody had a right to call himself a patent agent—that is to say, the law did not forbid him to do so. A right enjoyed in that way is not, within the meaning of this saving clause, a "right acquired." Otherwise it is obvious that such a clause would nullify the operation of any Act in which the clause was inserted. I am clearly of opinion that the saving clause does not apply to the position of a patent agent who had in fact been practising and describing himself as such prior to the passing of the Act. Such a person has privileges given to him expressly by sub-s. 3 of s. 1 of the Act which are right and reasonable, and which are not given to other persons—that is to say, he is entitled to be registered as a patent agent. Then, as to the second point, certain rules have been repealed, and it is contended that the words used in repealing those rules are wide enough to cover the rules in question. It is unnecessary for us to decide whether that is so or not. It is clear that the words of the Rules of 1890 are wide enough to raise the

1899

STAREY v. GRAHAM.

Channell J.

point, and to cause doubt whether or not the specific set of rules enacted in 1889 were repealed. Assuming, for the purposes of this case, that the Rules of 1889 were repealed by the Rules of 1890, there can be no doubt that it was done unintentionally and by inadvertence. But, supposing that they were repealed, the accident of that repeal is, I think, cured by what was in all probability another accident. In consequence of the incorporation of the Chartered Institute of Patent Agents, it became necessary in 1891 to make further provisions in regard to patent agents, and, accordingly, the Rules of 1891 were enacted. I do not understand that there is any doubt that all the provisions necessary to make the Rules of 1891 valid and effective were complied with; but those rules referred to and incorporated the Rules of 1889, and it is said that those rules, having been repealed, could not be re-enacted by a mere reference, but that in order to comply with the provisions of s. 101, sub-s. 4, of 46 & 47 Vict. c. 57, a copy of the Rules of 1889 should also have been laid before both Houses of Parliament in order to make them valid. For my part, I somewhat doubt whether the provisions of s. 101 are more than directory, and whether it is necessary in any particular case where reliance is placed on such rules to prove that its provisions had in fact been complied with. It seems quite clear that the Rules of 1891 do in fact re-enact the rules of 1889—if indeed they were ever repealed—since they expressly say that the Rules of 1889 shall have effect with certain modifications. It seems to me, therefore, that although the Rules of 1891 are framed on the supposition that the Rules of 1889 were still in force, yet if, in fact, they had by accident been repealed, the form of the Rules of 1891 is sufficient to re-enact them; and, as I understand that all the requisite formalities were gone through to make the Rules of 1891 valid, I think the Rules of 1889, if they were repealed, are now validly re-enacted.

The only question in the case which, if there had been no authority about it, would have caused me a little doubt is whether or not there was power to impose fees for registration on persons who, having been in practice as patent agents before

1899

STAREY v. GRAHAM.

Channell J.

the commencement of the Act, are in express terms entitled to be registered. But whatever doubt there was on that point has been removed by the decision of the House of Lords in *Institute of Patent Agents* v. *Lockwood.* (1) The result, therefore, is that the conviction must be affirmed.

Conviction affirmed.

Solicitors for appellant: *Firth & Co.*
Solicitors for respondent: *Radford & Frankland.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1899
Jan. 26.

AGIUS *v.* GREAT WESTERN COLLIERY COMPANY.

Damages—Contract—Costs of Legal Proceedings—Sale of Goods—Sub-sale—Costs of Reasonable Defence by Purchaser of Action against him by Sub-vendee.

The plaintiff, a coal merchant at Cardiff, having contracted with shipowners for the supply of coal to their steamers there, entered into a contract with the defendants, who were colliery proprietors also carrying on business at Cardiff, for the supply to him of coal, which was expressly stated to be for shipment in those steamers. The defendants committed a breach of their contract in not supplying coal under it with reasonable despatch, in consequence of which the supply of coal to one of the steamers by the plaintiff was delayed and the steamer was detained. The shipowners thereupon made a claim of 150*l.* upon the plaintiff in respect of her detention, and subsequently brought an action against him to enforce their claim. The plaintiff gave notice of the claim and action to the defendants, who repudiated all liability, and refused to take up the defence, stating however that they considered the claim preposterous, and the amount of it excessive. The plaintiff thereupon defended the action, paying 20*l.* into court, and at the trial he succeeded in shewing that the sum so paid in was sufficient. He then brought an action against the defendants for breach of their contract. The judge at the trial found that the course taken by the plaintiff in defending the action against him was reasonable:—

Held, that the plaintiff was entitled under the rule in *Hadley* v. *Baxendale*, (1854) 9 Ex. 341, to recover from the defendants as damages the amount of the costs reasonably incurred by him in defending the action

(1) [1894] A. C. 347.

C. A.
1899

AGIUS
v.
GREAT WESTERN COLLIERY COMPANY.

against him over and above the amount which he had received for costs as between party and party from the plaintiffs in that action.

Hammond & Co. v. *Bussey*, (1887) 20 Q. B. D. 79, followed.

Baxendale v. *London, Chatham and Dover Ry. Co.*, (1874) L. R. 10 Ex. 35, discussed.

APPEAL from the judgment of Channell J. in an action tried by him without a jury.

The action was for breach of a contract by the defendants for the supply of coals to the plaintiff.

The plaintiff was a coal merchant carrying on business in Cardiff, and the defendants were colliery proprietors having their principal offices there. The plaintiff, having made a contract with a firm called Nye, Clare & Co. for the supply to them of bunker coal for their steamers at Cardiff, effected the contract upon which the action was brought in order to enable him to carry out his contract with Nye, Clare & Co. The contract between the plaintiff and the defendants, which was contained in two letters dated May 23, 1896, described the coal as being purchased "for shipment in small lots of about 200 tons for bunkers of the steamers of Messrs. Nye, Clare & Co.," between the date of the contract and the end of the year. Notice having been given in December, 1896, by the plaintiff to the defendants that he would require about 400 tons of coal under the contract for one of Nye, Clare & Co.'s steamers which was loading in the tidal dock at Cardiff, there was delay in the supply by the defendants of the quantity of coal so required, by reason of which the sailing of the steamer was delayed. Her owners thereupon claimed from the plaintiff 150*l.* as damages for detention of the ship for four and a half days. The plaintiff wrote to the defendants informing them of the claim, and stating that he should hold them responsible in respect of it, and in answer the defendants wrote saying, "So far as we are concerned the claim is preposterous. We repudiate any liability on our part. If there is any fight, it will have to be your fight. We shall be pleased to assist you in every way we can." The plaintiff wrote again to the defendants respecting the claim made by the shipowners, saying, "As you are aware, there was no default on my part in the detention of the ship.

It was caused entirely through your coal not being available when required. I recommend the matter to your careful consideration before unnecessary expense in law proceedings is incurred, and I shall be glad to hear what you suggest." The defendants replied to the effect that they were not liable for the amount claimed in any way to anybody, and that they therefore definitely declined any responsibility for the detention of the ship. The shipowners then commenced an action against the plaintiff for the amount of their claim, and the plaintiff's solicitors thereupon wrote to the defendants' solicitors, asking whether the defendants would take up the defence of the action, and stating that, unless they did so, the plaintiff would pay the amount of the claim and costs, and hold them responsible in respect thereof. In answer, the defendants' solicitors wrote: "Our clients are not disposed to take up the defence in this action, as in their opinion no liability attaches to them. Of course it is no business of our clients what you choose to pay, but you may take it from us that we deny all liability, and under any circumstances it seems to us that the claim on the part of the owners of the ship is excessive." The plaintiff paid 20*l.* into court in the action against him by the shipowners, and, that action proceeding, upon the trial in the Commercial Court before a judge without a jury, he succeeded in shewing that the detention of the ship for four and a half days, in respect of which the shipowners claimed against him, was not all caused by delay in supplying coal for which he was responsible, the greater part of it having been caused otherwise, but it was proved that there had been unreasonable delay in supplying coal by the plaintiff, through which the ship had lost one tide, and had been thereby detained half a day. For that detention the learned judge was of opinion that damages of 20*l.* were sufficient, and accordingly the plaintiff, the defendant in that action, succeeded upon his plea of payment into court, and obtained judgment for his costs subsequent thereto. The plaintiff then brought the action against the defendants for breach of contract, claiming as damages the 20*l.* paid into court, the costs which he had to pay to the plaintiffs in the action against him in respect of the proceedings prior to the payment into court, and

C. A. 1899

AGIUS v. GREAT WESTERN COLLIERY COMPANY.

the extra costs of defending that action over and above the amount which he had received for costs as between party and party from the plaintiffs. Upon the trial, Channell J. found that there had been a breach by the defendants of their contract in not delivering the coal contracted to be supplied by them within a reasonable time, which was the cause of the breach by the plaintiff of his contract with the shipowners, and that the course taken by the plaintiff in defending the action brought against him by the shipowners and paying 20*l.* into court was under the circumstances a reasonable one; and he thereupon held that the plaintiff was entitled to judgment for the 20*l.*, for the amount which he had paid to the shipowners, the plaintiffs in the action against him, in respect of the costs of that action prior to the payment into court, and for the amount of his own solicitor's bill, his own costs to be taxed as between solicitor and client, but to be taxed upon the scale of taxation recognised by the masters in cases where costs as between solicitor and client are being taxed on the footing that another person is going to pay them, less the amount which he had received for costs as between party and party from the plaintiffs in the action against him.

The defendants appealed against this judgment. (1)

S. T. Evans, for the defendants. No time being fixed for delivery of the coal, the contract must be taken to be that the coal should be delivered within a reasonable time from notice of its being required. Upon the evidence the delay in delivery was not unreasonable.

If there was a breach of the contract, then a question arises as to the measure of damages. It is contended that the learned

(1) It was contended that upon the evidence there was no breach of contract by the defendants proved, that it was not proved that the defendants had notice of the circumstances with relation to the contract entered into by the plaintiff with the shipowners, and that the amount paid into court by the plaintiff in the action against him by the shipowners was excessive; but those points were either practically given up or decided against the defendants by the Court of Appeal upon the facts, and the only point involving a matter of legal principle which ultimately remained for decision is that reported. The facts and arguments are stated in the report with reference to that point.

judge was wrong in giving the plaintiff the costs incurred in defending the action against him by the shipowners. There is some conflict of authority on the point, but it is contended that, as a general rule, such costs as these can only be allowed as damages where there is a contract to indemnify. The case of *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1), in which it was held that such costs were not recoverable in a case of this sort, is in point. That case was followed in *Fisher* v. *Val de Travers Asphalte Co.* (2) The case of *Hammond & Co.* v. *Bussey* (3), which is hardly consistent with *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1), was a case of warranty, which nearly approaches that of a contract to indemnify, and it turned on very special circumstances. The plaintiff in that case had no opportunity of judging whether the coal was of the quality contracted for, and, the defendants asserting that it was, he was really driven to defend the action against him. If the authorities are in conflict, it is submitted that the decision in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1) should be followed rather than that in *Hammond & Co.* v. *Bussey.* (3) The authorities shew that in any case costs as between solicitor and client cannot be recovered, except when there is a contract of indemnity, the plaintiff's claim for costs being in contemplation of law satisfied by the costs as between party and party which he receives from the shipowners: Mayne on Damages, 5th ed. p. 86. [He also cited *Grébert-Borgnis* v. *Nugent.* (4)]

Bailhache, for the plaintiff. The evidence clearly shews a delay that under the circumstances was unreasonable.

With regard to the damages, the costs in question come within the second branch of the rule in *Hadley* v. *Baxendale.* (5) There is abundant evidence that the defendants knew the position of the plaintiff, and they contracted expressly with reference to the ships of Nye, Clare & Co., and, therefore, it must have been in their contemplation that, if they failed in performance of their contract, the ships might be detained, and a claim for demurrage would then be made; that, if such a

(1) L. R. 10 Ex. 35.
(2) (1876) 1 C. P. D. 511.
(3) 20 Q. B. D. 79.
(4) (1885) 15 Q. B. D. 85.
(5) 9 Ex. 341.

C. A. 1899

AGIUS v. GREAT WESTERN COLLIERY COMPANY.

claim was made, the amount to be recovered would require adjudication, unless it was admitted; and that it would have to be adjudicated upon in an action which would involve costs. All the authorities were fully discussed in *Hammond & Co.* v. *Bussey* (1), which entirely covers the present case. This case is really a stronger case than that, for there the defence in the action against the plaintiffs was altogether unsuccessful, and the defendant therefore got no benefit from it; but the plaintiffs nevertheless recovered the full costs incurred by them. The fact of the plaintiff having succeeded in this case in the defence, and so got some costs from the shipowners and cut down the damages in the interest of the defendants, as well as his own, cannot put him in a worse position than if the defence had been unsuccessful. The decision in *Fisher* v. *Val de Travers Asphalte Co.* (2) is explained in *Hammond & Co.* v. *Bussey* (1) as having proceeded on a wrong view of the decision in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (3) The latter case may be treated as decided on the ground that the defence was there unreasonable. The other grounds given were really obiter dicta. If that case conflicts with *Hammond & Co.* v. *Bussey* (1), it is submitted that the later case ought to be followed.

S. T. Evans, in reply.

EARL OF HALSBURY L.C. I am of opinion that this appeal must be dismissed. Only one question of any substance remains to be decided in this case. With regard to the question whether there was a breach by the defendants of their contract, it appears to me that there was ample evidence of such a breach. It is really unnecessary to retry that question, which was very faintly contested before the learned judge at the trial. It being, therefore, sufficiently proved, and practically uncontested, that there was a breach of contract by the defendants, the question arises, what amount of damages is recoverable for that breach of contract? Upon the hypothesis that there was a breach of contract, it was ultimately admitted, and it really could not upon the evidence be contested, that the plaintiff is

(1) 20 Q. B. D. 79. (2) 1 C. P. D. 511.
(3) L. R. 10 Ex. 35.

entitled to recover as damages the sum which he had to pay to the shipowners in their action against him; and in substance, therefore, the only question which we now have to determine is whether or not the costs incurred by the plaintiff in defending that action can be recovered by him from the defendants in the present action. This question certainly arises under circumstances which would render it a very unreasonable state of the law, if the plaintiff could not recover those costs. The result of the course taken by the plaintiff has been that, with regard to a very serious and important portion of the claim made by the shipowners, he succeeded in that action, and has in consequence recovered from the plaintiffs therein some costs for which credit has to be given to the defendants in the present action; and the plaintiff contends that what he reasonably did in his own interest in defending the action has enured to the benefit of the present defendants, for the amount of the damages, which admittedly would be recoverable over against them, was thereby reduced from the 150*l.*, the amount which was claimed, to 20*l.* It would be a strange thing, in my opinion, if the success of the defence, by which the damages were so reduced, prevented the plaintiff's recovering from the defendants the costs which he has incurred therein. I am very glad to say that in my view the law is not as contended for by the defendants. It was laid down in 1854 in the case of *Hadley* v. *Baxendale* (1), and has ever since been accepted as the guiding rule of law as to the measure of damages in an action of contract, that, when two parties have made a contract which one of them has broken, then, if the damages claimed in respect of the breach of contract are such as may be fairly and reasonably considered as arising naturally, i.e., according to the usual course of things, from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it, they are recoverable. Applying that test to the present case, is what happened here a consequence that might reasonably be expected to follow from the defendants' breach of contract? Both

(1) 9 Ex. 341.

C. A. 1899

AGIUS v. GREAT WESTERN COLLIERY COMPANY.

Earl of Halsbury L.C.

parties carried on business at Cardiff. The defendants knew what the plaintiff's business was, and that the coals were required for the purpose of supplying coals to steamers lying in the tidal harbour at Cardiff. Under the circumstances it is idle to suggest that it was not in the contemplation of the parties that a breach of the contract to supply coals would probably lead to such a claim against the plaintiff as was set up by the shipowners in this case. It would, under the circumstances, almost necessarily follow from a breach of the contract that such a claim would be made. It is also obvious that, if such a claim were made, it would be reasonable for the plaintiff, if, as was the case, he could not shew that he was not liable, to take such steps as might be necessary to ensure that, at all events, the damages recovered should not be extravagant. It would be contrary to the ordinary principles of conduct in business that he should not endeavour to do this. This is exactly what the plaintiff did in the present case. The question is whether, upon the principle laid down in *Hadley* v. *Baxendale* (1), the plaintiff has not a right to recover these costs as reasonably incidental to the breach of contract. But for the cases of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2) and *Fisher* v. *Val de Travers Asphalte Co.* (3), which have been referred to, I should have thought it quite impossible to suggest that it was not a consequence that might reasonably be expected to follow from the defendants' breach of contract that the plaintiff would have to enter into the litigation which resulted in the success of his resistance to the claim for damages to an extravagant amount. I really cannot see any distinction in substance between these costs and the charges of a surgeon employed in attendance upon a plaintiff who has sustained personal injuries through a tort. Therefore, apart from the authorities which have been cited, I should have thought it clear that the plaintiff is entitled to recover these costs as undoubtedly coming within the rule laid down in *Hadley* v. *Baxendale*. (1) The actual decision in the case of *Baxendale* v. *London, Chatham and Dover Ry. Co.* (2) upon the facts which

(1) 9 Ex. 341.

(2) L. R. 10 Ex. 35.

(3) 1 C. P. D. 511.

there existed raises no difficulty in my mind, because in that case there was no implied intimation, as in the present case, by the defendants that the action ought to be defended, and the defendants refused to give any authority to defend the action, which the plaintiffs persisted in doing, notwithstanding an opinion of counsel that they had no possible defence, and the defence was in fact unsuccessful; and therefore there was upon the facts a great body of objections to the contention that the costs of the defence should be allowed as the natural consequence of the defendants' breach of contract. If the judges in the Exchequer Chamber had been content to base their decision merely on those facts, I think it would have been clearly right. But unfortunately some of them thought it necessary, having regard to a previous decision, to express opinions which I must admit do not seem to me to be consistent with the view which I am now expressing. But any difficulty in which I might have found myself by reason of those opinions, which I think can hardly be considered as more than obiter dicta, being unnecessary for the decision of the case, appears to me to be removed by the decision in *Hammond & Co.* v. *Bussey* (1), which is, in my opinion, inconsistent with them. It is impossible, I think, to read the judgments of Bowen L.J. and Fry L.J. in that case without seeing that they disagreed with those opinions. I frankly admit that I do not think that the decision in the case of *Hammond & Co.* v. *Bussey* (1) can stand together with the opinions expressed in the case of *Baxendale* v. *London, Chatham and Dover Ry. Co.* (2): and, that being so, I think we ought to follow the later decision, which appears to me to be in conformity with the law as laid down in previous cases with which the opinions expressed in *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (2) seem to me to be in conflict, although the actual decision in that case is capable of being supported on the facts. For these reasons I think that the judgment must be affirmed.

A. L. SMITH L.J. I am of the same opinion. It is clear from the letters which constitute the contract that the defendants

(1) 20 Q. B. D. 79. (2) L. R. 10 Ex. 35.

C. A. 1899

AGIUS v. GREAT WESTERN COLLIERY COMPANY.

A. L. Smith L.J.

knew for what purpose and under what circumstances the coals which they contracted to supply were wanted; and therefore it must have been in their contemplation that the probable consequences of a breach of their contract would be that the plaintiff could not fulfil his contract to supply coal for the bunkers of the steamer for which it was required, and consequently a claim would be made upon him by the shipowners for damages for non-performance of his contract; and that, upon such a claim being made, the plaintiff would be in the position of having either to defend the action, or submit to pay the amount claimed by the shipowners. The evidence shews that the defendants broke their contract with the plaintiff, and in consequence he was unable to perform his contract with the shipowners, who thereupon made a claim against him for damages for his breach of contract. He thereupon wrote to the defendants informing them of the claim, and stating that it was the result of their not having fulfilled their contract to supply the coal. They wrote back that the claim was preposterous and excessive, and that they would give the plaintiff any assistance they could. What did that mean? Obviously it meant that the plaintiff could not give in and pay the amount claimed, or, at any rate, that, if he did, the defendants would not be responsible. What in these circumstances was he to do? He did what was unquestionably reasonable, as my brother Channell has found, namely, paid into court 20*l.* as being an amount reasonably sufficient to satisfy all damage that the shipowners were likely to be able to prove, and in the result it was found upon the trial that the amount so paid in was sufficient. Thereupon the plaintiff sues the defendants for the damages he has had to pay, namely, the 20*l.* and the costs which he has incurred. The defendants admit that, if they have broken their contract, they are liable to pay the damages that he has had to pay, but not the costs. I cannot see why he is not to have the costs to which he has been necessarily put in a proper defence of the action which was really conducted in ease of the defendants themselves. The cases of *Baxendale* v. *London, Chatham and Dover Ry. Co.* (1)

(1) L. R. 10 Ex. 35.

and *Fisher* v. *Val de Travers Asphalte Co.* (1) were put forward as authorities to shew that the plaintiff could not recover these costs. The former of the two cases might in my opinion rightly be decided and was decided upon the ground that the defence of the action was not reasonable. But both these cases came before this Court and were discussed in *Hammond & Co.* v. *Bussey* (2), and in deciding that case Bowen L.J. said, with regard to the existence of other grounds for the decision in *Baxendale* v. *London, Chatham and Dover Ry. Co.* (3) than the ground that the defence was unreasonable, that there must have been some other grounds for the decision because the judges did not decide solely on that ground, but that he could not exactly understand what those other grounds were. The case of *Hammond & Co.* v. *Bussey* (2) is the last decision on the subject, and it clearly covers this case. It was suggested that it was decided on very special circumstances, but I do not see that there were any circumstances in that case which do not exist here. The law as to the recovery of costs in such cases which is laid down in *Hammond & Co.* v. *Bussey* (2) in my opinion exactly applies to the present case, and is sound sense and good law.

CHITTY L.J. I am of the same opinion. I think the case falls within the rule laid down in *Hadley* v. *Baxendale* (4), namely, that damages are recoverable in an action for breach of contract which may reasonably be supposed to have been in the contemplation of the parties when they made the contract as the probable consequences of a breach of it. The coal was sold in this case for a particular purpose as is shewn upon the face of the contract itself. The plaintiff carried on business in the same town as the defendants, and they knew the nature of his business; and it appears from the terms of the letters which constitute the contract that they knew that the coal was wanted for steamers of which the steamer delayed was one. It is not necessary for me to repeat the facts at length, but I am satisfied that they were such as to bring the case within the doctrine of

(1) 1 C. P. D. 511.
(2) 20 Q. B. D. 79.
(3) L. R. 10 Ex. 35.
(4) 9 Ex. 341.

C. A. 1899

AGIUS v. GREAT WESTERN COLLIERY COMPANY.

Chitty L.J.

Hadley v. *Baxendale* (1) so far as the damages recovered by the shipowners from the plaintiff are concerned. Then comes the question as to the costs of the defence of the action brought by the shipowners against the plaintiff. Channell J. has held that the course taken by the plaintiff in defending that action was reasonable. It was taken really not only in his own interest, but in that of the defendants, for the result of it was to reduce the damages from 150*l.*, which was the amount claimed, to 20*l.*, and, by taking the step of paying 20*l.* into court, the plaintiff got from the shipowners the costs as between party and party of the proceedings subsequent to the payment into court. So the defence was one which in the result was for the benefit of the defendants. With regard to the authorities I have nothing to add except to say that I think that *Hammond & Co.* v. *Bussey* (2) was rightly decided, and that, if there is any conflict between it and *Baxendale* v. *London, Chatham and Dover Ry. Co.* (3), I think it ought to be followed rather than that case.

With regard to the scale upon which Channell J. has allowed the costs, I think that he made the right order in confining them to such costs as were reasonably incurred by the plaintiff, namely, first those which he had to pay to the plaintiffs in the action against him in respect of the proceedings prior to the payment into court, and secondly his own costs subsequent to that date, not meaning thereby any extravagant costs which he might choose to incur, but only reasonable costs upon the footing that the costs were to be paid by a third party.

Appeal dismissed.

Solicitors for plaintiff: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

Solicitors for defendants: *Downing, Bolam & Co., for Downing & Handcock, Cardiff.*

(1) 9 Ex. 341. (2) 20 Q. B. D. 79.
(3) L. R. 10 Ex. 35.

E. L.

KITSON, Appellant *v.* ASHE, Respondent.

1899
Jan. 27.

Municipal Corporation—By-laws—Validity—Private Ground used for Betting —"Place of Public Resort."

The Middlesborough Improvement Act, 1877 (40 & 41 Vict. c. xxx.), s. 25, empowers the corporation to make "such by-laws as they may think fit for the prevention of betting . . . . in the public streets . . . . and other places of public resort within the borough."

The corporation made a by-law that "any person who shall frequent and use any street . . . . or other place of public resort within the borough . . . . for the purpose of bookmaking or betting . . . . shall be liable to a penalty."

The appellant used for the purpose of bookmaking an uninclosed piece of private ground within the borough, bounded by streets. Bookmakers and other persons habitually used the ground for betting, but without permission from the owner. The appellant and the other bookmakers conducted their business in an orderly manner, and caused no nuisance, annoyance, or obstruction. The appellant was convicted under the by-law.

On a case stated:—

Held, that the by-law was within the power given by the Act, and was valid; that, as the ground was in fact habitually used by the public, it was a "place of public resort," within the meaning of the by-law; and that the appellant was rightly convicted.

Case stated by the stipendiary magistrate for the borough of Middlesborough.

The appellant was summoned upon an information laid by the respondent, by which the appellant was charged, "For that he, on June 2, 1898, at the borough of Middlesborough, did frequent and use a certain place, called 'The Betting Ground,' in Snowdon Road, for the purpose of bookmaking or betting, contrary to the form of the by-law in such case made and provided."

The by-law under which the proceedings were taken was as follows: "Any person who shall frequent and use any street, passage, recreation ground, or other place of public resort, within the borough of Middlesborough, either on behalf of himself or of any other person, for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, with any

1899

KITSON v. ASHE.

person, shall be liable to a penalty not exceeding 5*l.* for each offence."

The following facts were proved or admitted. The place called "The Betting Ground," was a piece of private ground situate in the borough of Middlesborough, about seventy yards by thirty-five yards, upon which the owner was from time to time gradually building houses. It was not inclosed by any barrier or fence, but was bounded by Snowdon Road, Italy Street, Charlotte Street, and Washington Street. On two sides there were flagged footpaths. The piece of ground was used by bookmakers and members of the public averaging in number about 300 persons daily, who went there for the purpose of betting, but without permission from the owner to do so. On the day mentioned in the information the appellant and other bookmakers frequented and used the piece of ground for the purpose of bookmaking and betting. The appellant and the other bookmakers did not confine themselves to any spot in the piece of ground, and had no apparatus to denote the spot where they carried on their business, but moved about, and made bets in various parts of the piece of ground. The appellant and the other bookmakers conducted their business in an orderly manner, and did not cause any nuisance, annoyance, or obstruction whatever, to persons using the streets or footpaths which bounded the piece of ground, or to any of the residents in the houses in the immediate neighbourhood, and no complaint had been made to the police that the presence and conduct of the appellant, or the other bookmakers or persons who used the piece of ground, caused either a nuisance, annoyance, or obstruction to the public. It was contended on behalf of the appellant that the by-law did not apply to private property within the borough, and that the piece of ground, upon which the appellant had been bookmaking and betting, was neither a street, passage, recreation ground, nor other place of public resort, within the meaning of the by-law. It was further contended that, if the piece of ground was either a street, passage, recreation ground, or other place of public resort, within the meaning of the by-law, then the by-law was unreasonable and ultra vires, because bookmaking and betting

were not illegal, and in the case of private property the by-laws must be confined to matters causing a nuisance, annoyance, or obstruction to the public in the borough.

The magistrate came to the conclusion that the piece of ground was a place of public resort, within the by-law, and that the by-law was not ultra vires, and convicted the appellant.

The question for the opinion of the Court was, whether, upon the above statement of facts, the magistrate came to a correct conclusion in point of law, and, if not, what should be done in the premises.

Luck, for the appellant. In the first place the by-law, under which the appellant was convicted, does not cover the facts of the case. The by-law purports to be made under the Middlesborough Improvement Act, 1877, s. 25 (1), and the words of that section apply only to public places. The piece of ground described in the case is not a public place, nor a place of public resort, for the case shews that it is private ground, over which the corporation have no control, and from which the owner can exclude the public, if he thinks fit to do so. A place of public resort means a place to which the public have a right to resort.

Secondly, the by-law is ultra vires and void. It goes beyond the statute, in omitting the word "public" before "street." Betting is not in itself illegal, where it does not come within the Betting Act, 1853 (16 & 17 Vict. c. 119), and this by-law therefore purports to turn into a criminal offence an act which would otherwise not be illegal, which is a further objection to the validity of the by-law: *Strickland* v. *Hayes*. (2)

[CHANNELL J. The fact that a by-law creates a new offence

(1) The Middlesborough Improvement Act, 1877 (40 & 41 Vict. c. xxx.), s. 25: "The corporation from time to time may make, and when made may repeal, amend, or alter, such by-laws as they may think fit for the prevention of betting, gambling, and playing of pitch and toss, and of public offences and nuisances, in the public streets, passages, Albert Park, and recreation grounds, and other places of public resort within the borough . . . . and may impose penalties for the breach or non-observance thereof not exceeding 5*l*. for each offence."

(2) [1896] 1 Q. B. 290.

1899

KITSON v. ASHE.

cannot now be considered an objection to its validity: *Burnett* v. *Berry* (1); *Kruse* v. *Johnson*. (2)]

Scott Fox, Q.C., for the respondent. The by-law comes within the powers conferred by the Act, and is valid. It is made "for the prevention of betting . . . . in the public streets, ... and other places of public resort." The case comes within the words of the by-law, for the facts stated shew that the piece of ground in question was a place to which the public did, as a matter of fact, habitually resort, and therefore, according to the plain grammatical meaning of the words, it was a place of public resort.

Luck replied.

LAWRANCE J. I am of opinion that the decision of the magistrate in this case was perfectly right, and ought to be affirmed. The by-law under which the appellant was convicted, which is set out in the case, is made under s. 25 of the Middlesborough Improvement Act, 1877 (40 & 41 Vict. c. xxx.), and, with the exception of one word, it follows the words of that section. The only difference between the two is, that the word "public" occurs before the word "streets" in the section, but not in the by-law. The only question which we have to decide here is, whether betting on private ground, where people habitually assemble for betting, is betting in a place of public resort, within the meaning of the section and the by-law. I may observe that the case states that the place in question is called "The Betting Ground." It is clearly a place of public resort in the ordinary sense of the words. The public do in fact go there, though, if the owner pleased, they could be turned off; but in the same way people could, under certain circumstances, be turned out of many other places, such as parks and recreation grounds, which are undoubtedly places of public resort. It is like the case of a vacant piece of ground, such as one sometimes sees, situated between a highway and a dwelling-house, on to which the public do, as a matter of fact, go, although the land belongs to the owner of the house, and he could exclude the public from it, if he chose

(1) [1896] 1 Q. B. 641. (2) [1898] 2 Q. B. 91.

to do so. That would certainly be correctly described as a place of public resort. It does not matter who the owner is, or what his rights are, so long as the place is in fact resorted to by the public.

CHANNELL J. I am of the same opinion. It is not necessary for us to decide whether such a by-law as this could be made under the provisions of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23. That was the question which came before the Court in *Burnett* v. *Berry* (1), which is therefore altogether different from the present case. I should say that a by-law could not be made, under the Middlesborough Improvement Act, to prevent betting in a purely private place; but that is not what this by-law purports to do. I think the by-law now before us covers the present case, and that it is within the power conferred by the Act. It is really the same point, whichever way it is put, for the words of the Act and of the by-law are substantially the same. The by-law imposes a penalty for using for the purpose of betting "any street, passage, recreation ground, or other place of public resort, within the borough." The only question is, to what places do these words extend? Does "other place of public resort" mean a place to which the public are entitled to go as of right, or a place to which the public do go as a matter of fact? I am of opinion that the latter is the true meaning. As the owner of this piece of land does let the public go on to it and the public do go there, I think it comes within the words of the by-law, and the appellant was rightly convicted.

Judgment for the respondent.

Solicitors for appellant: *Hamlin, Grammer & Hamlin, for Wilkes & Wilkes, Middlesborough and Darlington.*

Solicitors for respondent: *Belfrage & Co.*

(1) [1896] 1 Q. B. 641.

P. B. H.

1899
Jan. 28.

WATSON *v.* PETTS (No. 2).

County Court—Practice—Costs—Action struck out for Want of Jurisdiction—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 88, 89, 113, 114.

Where an action in a county court is struck out for want of jurisdiction under s. 114 of the County Courts Act, 1888, the Court may, if it shall think just, award costs against the defendant.

APPEAL from the decision of Lawrance J. at chambers dismissing an application for a prohibition.

An action was brought in the county court of Derbyshire holden at Ashborne for damages for trespass and for an injunction. The defence set up was a claim to a right of way over the plaintiff's land. The trial took place on May 11, 1898, and judgment was reserved, the judge requesting both parties to put their respective contentions into writing and to send them to the registrar for the judge. This was done in or about the first week in June.

On June 8, 1898, the defendant applied for and obtained leave to reopen the case as further evidence had come to hand. The county court judge in granting the application gave leave to both plaintiff and defendant to call further evidence, and reserved the costs of the application and of the further hearing. In granting the application the judge warned the defendant that he might have to pay the additional costs incurred whatever the result of the action might be.

Between June 8 and July 13 the plaintiff obtained a commission to examine an aged and infirm witness.

On July 13, 1898, evidence having been given by the defendant that the value and rent of the lands in respect of which he claimed the right of way exceeded the sum of 50*l.* per annum, the objection was taken that the court had no jurisdiction; and the county court judge held the objection good, and ordered the case to be struck out, making the following order as to costs: "I order the plaintiff to pay the defendant's costs up to and of the first hearing, and his own costs up to and of that hearing. I order the defendant to pay the plaintiff's costs of

the application at the last court and of the commission, and such costs of to-day's proceedings as the registrar thinks to have been rightly incurred." The defendant applied at chambers for a writ of prohibition to the county court judge to prohibit him from proceeding in the matter (except in so far as the plaintiff was ordered to pay the defendant's costs and his own costs up to the first hearing) on the ground that the judge had no jurisdiction to make the order. Lawrance J. refused the application, and the defendant appealed.

It was held that the appeal lay to the Divisional Court, and not in the first instance to the Court of Appeal: *Watson* v. *Petts*. (1)

J. M. Stone, for the appellant. The county court judge had no jurisdiction to make any order on the defendant to pay costs. Where an action is struck out for want of jurisdiction, the only power to order costs is given by s. 114 of the County Courts Act, 1888. (2) That section gives power to the Court

(1) Ante, p. 54.

(2) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 60, "A judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question . . . . in case of an easement or licence where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed . . . . shall exceed the sum of fifty pounds by the year."

By s. 88, "If upon the return day, or at any continuation or adjournment of the court or of the action or matter, the plaintiff shall not appear, the action or matter shall be struck out; and if he shall appear, but shall not make proof of his claim to the satisfaction of the Court, it shall be lawful for the judge to nonsuit the plaintiff or to give judgment for the defendant, and in either case, where the defendant shall appear and shall not admit the claim, to award to the defendant by way of costs and satisfaction for his trouble and attendance such sum as the judge in his discretion shall think just. . . ."

By s. 89, "In every case where the plaintiff shall not appear either in person or by some person duly authorized on his behalf upon the return day, or at any continuation or adjournment of the Court or of the action or matter, and the defendant shall appear either in person or by some person duly authorized on his behalf, it shall be lawful for the Court to award to the defendant, by way of costs of attendance and satisfaction for his trouble, such sum as the Court shall think just."

By s. 113, "All the costs of any action or matter in the court not herein otherwise provided for shall be paid by or apportioned between the parties in such manner as the Court shall think just. . . ."

By s. 114, "Whenever an action or matter is commenced over which

1899

WATSON v. PETTS (No. 2).

to award costs in the same manner as if the Court had had jurisdiction, and the plaintiff had either not appeared or had failed to make out his case. The power of the county court to award costs in those instances is given by ss. 88 and 89. Those sections only give power to order the plaintiff to pay costs. There is, therefore, no power in such a case to order the defendant to pay any costs: *Lawford* v. *Partridge*. (1) [He also cited *Mayor, &c., of London* v. *Cox* (2) and *Farquharson* v. *Morgan*. (3)]

W. Clarke Hall, for the respondent. The county court judge was within his jurisdiction in making the order. The defendant by his conduct had consented to give the judge jurisdiction to try the case. He had expressly assented to the costs of the further hearing being reserved. That was, therefore, sufficient to give the judge jurisdiction over the costs. Sect. 114 only comes into operation when the objection to jurisdiction is taken, and the costs incurred prior to that objection are in the discretion of the judge. But assuming that s. 114 applies to all the costs, the power given by ss. 88 and 89 is not the sole power over costs that a judge has where a plaintiff does not appear or fails to make out his case. Those sections are not exclusive of s. 113, which gives a judge power to award costs as he may think fit. Sect. 113, therefore, must be read into ss. 88 and 89. [He referred to *Broad* v. *Perkins* (4) and *Moore* v. *Gamgee*. (5)]

J. M. Stone, in reply. Sect. 113 cannot be read with ss. 88 and 89. Costs in the case of a plaintiff who has not appeared, or has failed to make out his case, and therefore, in a case where the Court has no jurisdiction, are "otherwise provided for" by ss. 88 and 89, and s. 113 is therefore excluded.

---

the Court has no jurisdiction, the judge shall, unless the parties consent to the Court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner as if the Court had jurisdiction therein, and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint."

(1) (1857) 26 L. J. (Ex.) 147.
(2) (1867) L. R. 2 H. L. 239.
(3) [1894] 1 Q. B. 552.
(4) (1888) 21 Q. B. D. 533.
(5) (1890) 25 Q. B. D. 244.

1899

WATSON v. PETTS (No. 2).

DARLING J. In this case an application is made to us to reverse a decision of my brother Lawrance at chambers, by which he refused to grant a writ of prohibition to a county court. It appears to be agreed on both sides that the county court had no jurisdiction to entertain the particular case; but, before the point was taken that there was no jurisdiction, the plaintiff and the defendant had been several times before the Court, and the county court judge had in fact ordered the case to be reopened on the defendant's application, with leave to both parties to call further evidence, and had expressly reserved the question of costs, and had warned the defendant that he might have to pay them. At the adjourned hearing of the case, the objection to the jurisdiction of the Court was for the first time taken by the defendant, and the county court judge then held that objection to be good, and struck out the case, and made the following order as to costs: "Plaintiff to pay defendant's costs up to and of the first hearing, and his own costs up to and of that hearing. Defendant to pay the plaintiff's costs of the application at the last court, and of the commission and such costs of to-day's proceedings as the registrar thinks to have been rightly incurred."

It is contended that under the circumstances the county court judge had no jurisdiction to order the defendant to pay any costs at all in the case, and it is argued that the effect of ss. 114 and 88 and 89 of the County Courts Act, 1888, is that in no case where the action is struck out for want of jurisdiction can the county court judge order the defendant to pay any costs at all. I confess that I have felt considerable doubt on the matter, and that that doubt has not been altogether removed; but, with some hesitation, I am inclined to think that the contention for the plaintiff is right, and that s. 113 must be read into ss. 88 and 89, and that will give the county court judge jurisdiction to order the defendant to pay costs in such a case as the present. By s. 114, whenever an action or matter is commenced over which there is no jurisdiction, the judge after striking it out may award costs "in the same manner, to the same extent, and recoverable in the same manner" as if the Court had jurisdiction, "and the plaintiff had not appeared, or had appeared and failed to prove his demand

1899

WATSON v. PETTS (No. 2).

Darling J.

or complaint." His jurisdiction as to costs in those two cases is given, no doubt, by ss. 88 and 89; but I think that those sections do not exclude s. 113, which enables the Court to apportion the costs between the parties in such manner as it shall think just.

As to the other point raised in the case I feel less difficulty. I do not think that the defendant ever consented to give the Court jurisdiction to try the case, but I think that by appearing and taking part he did consent to the Court issuing interlocutory orders, and I think that he thus waived his right to raise his point as to the want of jurisdiction in respect of such orders. That seems to me to be especially the case with regard to the commission for the examination of the plaintiff's witness; and I do not think that the defendant, having once waived his right in this respect, can afterwards withdraw that waiver. Therefore, I think that the county court judge had jurisdiction to award such costs against the defendant. That is the main ground of my decision in this case; but I do not wish to dissent from the strong view on the first point which has been taken by my brother Channell, whose experience of such matters is much greater than my own.

CHANNELL J. I also think that the prohibition must be refused. As to the question of waiver, I think that there is a considerable case for holding that the defendant had waived his right altogether to object to the jurisdiction, and that the county court judge, therefore, had jurisdiction over the whole matter. But that is a question of great difficulty, because while the general rule is that jurisdiction cannot be given by consent, that is not the case in the county court, where consent may in certain circumstances give jurisdiction. There is no clear rule as to what amount of consent will give jurisdiction. It therefore is difficult to apply to a county court the strict rules laid down as to prohibition in *Mayor, &c., of London* v. *Cox*. (1)

But as to the other question I feel no doubt. It is clear that, apart from the statute, where the county court has no jurisdiction over any action or matter, it has also no jurisdic-

(1) L. R. 2 H. L. 239.

tion as to costs; but by s. 114 of the County Courts Act, 1888, where the action or matter is struck out for want of jurisdiction, the Court may award costs in the same manner as if the Court had had jurisdiction, and the plaintiff had either not appeared, or had appeared and failed to prove his demand or complaint. We have, therefore, to see what that power is. It is contended that the sole power in those cases is given by ss. 88 and 89, and that where a plaintiff fails to appear, or having appeared fails to establish his case, the Court can give no costs against the defendant. In my opinion that is not so. I do not think that the power given by those sections excludes the power given by s. 113. By that section "All the costs of any action or matter in the Court not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just." I do not think that the power given by ss. 88 and 89 to award the defendant a lump sum for his costs comes within the phrase "herein otherwise provided for" in s. 113. As it seems to me, s. 113 must be read with ss. 88 and 89; and I can see no reason why it should be supposed that the Legislature did not intend to give the judge power to award any costs against the defendant in cases where the plaintiff has either not appeared or failed to make out his case. The costs of adjournments are often ordered to be paid by the party ultimately successful; and I think that if on the last hearing the judge had held that the value of the property did *not* exceed 50*l.*, so that the case was within his jurisdiction, but had further held that the plaintiff had failed to make out his case, he might then have made precisely the same order as to costs as he has in fact made. That being so, the judge had jurisdiction to make this order, and the application for a prohibition was rightly refused. I agree, therefore, in thinking that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *G. F. Hudson, Matthews & Co., for John Bamford, Son & Wilson, Ashborne.*

Solicitors for respondent: *Chester & Co., for E. A. Paine, Hanley.*

A. P. P. K.

1898
Nov. 23.

[IN THE COMMERCIAL COURT.]

ASHMORE & SON *v.* C. S. COX & CO.

Sale of Goods—Contract—Shipment to be made by Sailing Ship between specified Dates—Condition Precedent—Implied Condition—Measure of Damages.

By agreement in writing the defendants sold to the plaintiffs 250 bales of Manila hemp, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers between May 1 and July 31, 1898; the agreement contained a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. In consequence of the Spanish-American war it was in a business sense impossible for the defendants to ship hemp by sailer between the specified dates, but in September they shipped hemp (which would otherwise have satisfied the contract) by steamer, and on October 27 declared it against the contract; the plaintiffs refused to accept this declaration, and returned it to the defendants, who, on November 4, wrote that it was the only declaration that they were in a position to make:—

Held, that the stipulations as to shipment by sailer or sailers between the specified dates were conditions precedent and the declaration was bad; that it was not an implied condition of the contract that it should be possible to ship by sailer between those dates; that the defendants were not protected by the express condition as to non-arrival of the goods, the non-arrival not having been occasioned by any unavoidable cause within the meaning of the contract; and that the damages were to be ascertained by reference to the market price on November 4, the day on which the defendants finally notified their inability to make a declaration in accordance with the contract.

Action tried in the Commercial Court by the Lord Chief Justice without a jury.

The statement of claim, which claimed damages for breach of contract, alleged the sale by the defendants to the plaintiffs of a quantity of Manila hemp by a written contract, a condition of which was averred to be that shipment of the hemp was to be made by sailer or sailers from the Philippine Islands to London between May 1 and July 31, 1898, the breach alleged being that the defendants did not ship hemp by sailer or sailers between those dates, but that they declared against the contract hemp shipped by steamer in September, which the plaintiffs refused to accept. The defence admitted the contract, but

alleged that the terms as to sailers and time of shipment were not conditions precedent; that the shipment was in compliance with the terms of the contract; and, alternatively, that by reason of the Spanish-American war performance of the terms as to shipment by sailer between May 1 and July 31 became impossible, and the contract was pro tanto dissolved. A further defence of waiver by the plaintiffs of compliance with the terms as to shipment was found against the defendants during the course of the case. The facts, which will be found in detail in the judgment, were in substance as follows:—

The contract was contained in a letter dated April 27, 1898, from the defendants to the plaintiffs, by which the defendants sold to the plaintiffs 250 bales of Manila hemp at 25*l.* 10*s.* per ton of eight bales; the terms of the letter material to this report were these: "Shipment to be made from a port or ports in the Philippine Islands, by sailer or sailers, direct or indirect to London, between May 1 and July 31, 1898, both inclusive. Declaration to be made before vessel reports at Custom House. Should the goods, or any portion thereof, not arrive in London from loss of vessel, or other unavoidable cause, this contract to be void for such portion; but should the goods, or any portion thereof, be transhipped and arrive in other vessel or vessels, for account of the original sellers, the contract still to hold good for such portion."

No hemp was shipped by or for the defendants between May 1 and July 31, nor was any shipment made between those dates by other persons which the defendants sought to appropriate to their contract with the plaintiffs. On September 15 250 bales of hemp were shipped by or for the defendants at a port in the Philippine Islands on the steamship *Dulwich*, which vessel was expected to arrive in London about the time that hemp would arrive if shipped on a sailer between the named dates. On October 27 the defendants made, and sent to the plaintiffs, a declaration of the shipment by the *Dulwich* as a declaration of a shipment within the terms of the contract. On October 29 the plaintiffs wrote to the defendants returning the declaration on the ground that their buyers would not accept the hemp, as it was not in accordance with their contract.

1898

ASHMORE & SON v. C. S. COX & CO.

Other correspondence ensued between the parties, and on November 4 the defendants wrote to the plaintiffs a letter in which they said that they were not in a position to make another declaration, and that the parcel of hemp for which they had declared was the only and final one which they could declare. For the purpose of obtaining a decision on the questions raised, it was admitted that performance of the terms of shipment by sailer between the named dates became in a mercantile sense impossible by reason of the Spanish-American war. In the course of the case, however, it appeared that between the named dates there had been a shipment by sailer to Liverpool of hemp which, had it been a shipment of the defendants, would have satisfied the contract with the plaintiffs.

Joseph Walton, Q.C. (*J. A. Hamilton* with him), for the defendants. The declaration by the *Dulwich* was a good declaration under the contract. The provisions as to shipment by sailers between certain dates were inserted in order that the purchasers might be able to fix approximately the date of arrival, and this steamer was expected to arrive about the same time as a sailer leaving between the specified dates; these provisions do not go to the root of the contract, and are not conditions precedent. In any event the defendants are excused from the fulfilment of the contract by reason of its performance having become impossible. It was an implied condition of the contract that shipment by sailer or sailers between the named dates should be possible, and the existence of a state of war made it impossible to comply strictly with the contract. There being no possibility of shipping and despatching hemp on sailers between the named dates, there were no goods in existence which were capable of being delivered under the contract, and performance of the contract by the defendants was therefore excused: *Howell* v. *Coupland* (1); *Taylor* v. *Caldwell*. (2) Even if there is no implied condition, the defendants are excused by the express stipulation that the contract is to be void if the goods do not arrive in London from loss or other unavoidable cause; the impossibility of shipment under the

(1) (1876) 1 Q. B. D. 258. (2) (1863) 3 B. & S. 826.

contract owing to a state of war is such a cause. If the defendants are liable under the contract, the measure of damages should be the difference between the contract price and the market price on November 4, the day on which the defendants finally declined to make any other declaration.

R. B. D. Acland, for the plaintiffs. The provisions as to shipment were conditions precedent, and amounted to an absolute undertaking by the defendants that the goods should be shipped on sailers and between certain dates. The contract being an absolute one, it is no answer to an action for its breach that its performance has become impossible: *Paradine* v. *Jane* (1); *Clifford* v. *Watts* (2); and no implied condition should be read into it. *Howell* v. *Coupland* (3) is distinguishable; the contract there was held to be for the sale of a specific crop to be grown on specific land, and as before breach a large portion of the crop perished without default on the seller's part he was held to be excused. Nor are the defendants protected by the express words of the contract; the expression "other unavoidable cause" must be read as ejusdem generis with loss of vessel, and can have no application until after the goods have been in fact shipped under the contract. The measure of damages should be calculated on October 27, the day on which the declaration was first made by the defendants.

Joseph Walton, Q.C., in reply.

LORD RUSSELL of KILLOWEN C.J. In this case the plaintiffs are suing the defendants for breach of contract of April 27, 1898. The contract related to an intended shipment of 250 bales of Manila hemp at a stipulated price, to be shipped by sailer or sailers between May 1 and July 31. The plaintiffs say that the defendants failed to comply with the contract. The facts are these. The contract was entered into on April 27, 1898. No shipment was made by the defendants or for them between May 1 and July 31, 1898, and no shipment was made by any other persons which the defendants sought to appropriate to the contract. But on or about September 15 a

(1) (1647) Aleyn, 26. (2) (1870) L. R. 5 C. P. 577, 586.
(3) 1 Q. B. D. 258.

1898

ASHMORE & SON v. C. S. COX & CO.

Lord Russell C.J.

shipment was made by a steamship called the *Dulwich* from Manila of hemp which would in regard to character and quality have satisfied the contract. Following that shipment, the defendants on October 27 made a declaration of that shipment as a declaration of a shipment within the terms of the contract.

The first question is whether that is a proper declaration in compliance with the terms of the contract. The declaration is addressed by the defendants to the plaintiffs, and is in these terms: "Contract, April 27, 1898, No. ...., for 250 bales F. Ct. Manila hemp. In fulfilment of the above, we beg to declare the following and request your confirmation in due course. F. C. 250 bales. Per *Dulwich* (ss.), London. Bill of lading, dated Manila, 15/9/98, (signed), C. S. Cox & Co." On October 29 the plaintiffs wrote: "Contract dated 27/4/98, 250 bales hemp F. C., May–July sailer. We return herewith your declaration for 250 bales F. C. hemp, per *Dulwich*, against above contract. We are instructed by our buyers to say they will not accept this hemp, as it is not in accordance with their contract." They do not state the grounds upon which they take up that position, but it is clear that the grounds were that the shipment was not by sailer or sailers, and was not made between May 1 and July 31. So the matter went on, the plaintiffs not in terms treating that declaration as a breach of the contract, but contenting themselves with saying, "We cannot accept this as a proper declaration such as we are entitled to under the terms of our contract." On November 4 the defendants for the first time write saying that they are not in a position to make any other declaration than the declaration of the shipment by the *Dulwich*. Up to that time it would have been open to the defendants, as I conceive, had the circumstances of the trade permitted of it, to have got hold of any other shipment, if there were any such, of Manila hemp by sailer or sailers shipped between May 1 and July 31, and applied such shipment to the contract in question. In my judgment the defendants are not estopped, if they make a declaration which is properly objected to as not answering the contract, from making a fresh declaration, provided always

they can make a fresh declaration within a reasonable time conformably with the contract.

The first question that arises upon this state of facts is, "Was the declaration a bad declaration?" On behalf of the defendants it is said that it was not bad, upon the ground that neither the stipulation as to sailer or sailers (being the character of the vessel to carry the intended shipment), nor that as to the dates between which the shipments were to be made, were conditions precedent in the contract, but were merely collateral stipulations, which, if the breach of them entailed damages upon the buyer, would give him a right of action. I am unable to accept that contention. No doubt there are a number of cases, all turning upon the particular contract, in which the Courts have held that certain stipulations, which did not go to the essentials of the contract, are not conditions precedent. But those cases do not, in my judgment, apply to the dates of shipment in the present contract, and I am inclined to think also that they do not apply to the provision that shipment is to be made by sailer or sailers on this short ground—that in the present contract the parties have chosen by the very terms in which the stipulation appears to make those events conditions precedent. They have said that the buyers shall not be called upon to accept a shipment not in sailer or sailers, or not made between May 1 and July 31. I therefore hold that those stipulations are conditions precedent.

On behalf of the defendants it was also contended that they were excused from the fulfilment of the contract on the ground of impossibility of performance of it. This contention was divided into two heads. First, it was said that it was an implied condition of the contract, and therefore not depending upon the express words of the contract, that it should be possible to ship between the named dates by sailer or sailers. In support of that contention one or two cases were cited, the principal being *Howell* v. *Coupland*. (1) In my judgment that case is no authority for the proposition here contended for; it turned on the construction of the contract in that case. The Court there construed the contract as meaning that the buyer took the chance of the

(1) 1 Q. B. D. 258.

1898

ASHMORE & SON v. C. S. COX & CO.

Lord Russell C.J.

contract being defeated in its performance by failure of the potato crop by disease, the seller using all reasonable skill. That has no bearing upon the present case. Here the stipulations are that the defendants shall sell 250 bales of hemp; that the shipment shall be made from the Philippine Islands, that it shall be made by sailer or sailers, that it shall be made between the named dates, and that the declaration shall be made in the manner provided by the contract. The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sailer or sailers between May 1 and July 31, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition. I do not know that it is necessary, apart from the question of construction which remains, to refer to the fact that it does appear that there was a shipment which would have been capable of appropriation to this contract, if the sellers could have got hold of it—a shipment to Liverpool of hemp of the requisite quality and quantity.

Secondly, it is said that, even though there is no such implied condition, there is an express condition in the contract that it shall be possible to ship the goods in conformity with the terms of the contract. The condition is as follows: "Should the goods or any portion thereof not arrive in London from loss or other unavoidable cause, this contract to be void for such portion." Undoubtedly, reading that clause by itself apart from the terms of the contract, I should have hesitated a long time before I arrived at the conclusion that, standing alone, it necessarily applies only to goods in fact shipped. But it cannot be read so as to give effect to the object of the contract between the parties without having regard to the other stipulations contained in the contract. The ship was not, as it were, earmarked. The seller might appropriate to the contract any shipment of proper quality by sailer or sailers between the

1898

ASHMORE & SON v. C. S. COX & CO.

Lord Russell C.J.

stipulated dates. It is therefore true to say, as was very forcibly argued on behalf of the plaintiffs, that when you come to consider the concluding words of that clause it is clear that the buyer has nothing to do with any goods not appropriated to the contract by declaration, and it is clear that the defendants, having made a faulty declaration, might declare another shipment made by any ship answering the description in the contract. The condition therefore contemplates goods which have been shipped, and I think also declared. In my judgment the facts in this case do not shew that the non-arrival of the goods in London was caused by any unavoidable cause within the meaning of the contract.

As to the question of damages. If when the defendants made the declaration which I have held to be bad under the contract they had said, "This is the only declaration we can make," and the plaintiffs had said, "Very well, you have broken the contract," the measure of damage would be computable by the difference between the contract price and the market price at that date. But the plaintiffs merely said, "We cannot accept this as a declaration." I think that if the defendants could then have obtained a shipment which complied with the terms of the contract they might have amended the declaration, because the plaintiffs had not treated that as an absolute breach and repudiation of the contract. On November 4 the defendants stated that they could not make any other declaration—in effect, that they repudiated the contract. The plaintiffs thereupon issued their writ. The difference between the contract price and the market price on November 4 is the measure of damages.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for defendants: *W. A. Crump & Son.*

W. J. B.

1899
Jan. 13.

YABBICOM, Appellant *v.* KING, Respondent.

Local Government—Local Authority—By-laws, Power to Dispense with Observance of—"Approved" Plan.

A local authority, empowered to make by-laws for the regulation of buildings within its jurisdiction, has no power to sanction plans in contravention of by-laws properly made.

An "approved" plan is a plan which has been lawfully approved by a local authority, and not one which has merely received their approval in fact.

Case stated by justices for the city and county of Bristol pursuant to 42 & 43 Vict. c. 49, s. 33.

The respondent had appeared to answer an information preferred by the appellant under s. 35 of the Bristol Improvement Act, 1847, charging that the respondent unlawfully did erect a certain house contrary to the provisions of the said Act, inasmuch as he omitted to build a parapet to the said house; upon the hearing the information was dismissed.

The facts proved at the hearing were as follows. The house mentioned in the information was erected by the respondent at Bell Hill, in the parish of St. George, in the city and county of Bristol, at a date subsequent to October 31, 1897, which was the date of the commencement of the Bristol Corporation Act, 1897. Prior to that date the parish of St. George was situate in the urban district of St. George, in the county of Gloucester, but by the provisions of that Act the said parish became part of the city and county of Bristol. The house was one of a continuous row of houses, and the walls separating it from the adjoining houses on either side were party walls. The respondent had not erected parapet walls on the party walls, and had not carried up the party walls above the roofs of the adjoining houses. The house was erected in accordance with a plan deposited by the respondent with the urban district council of St. George before June 12, 1896. The plan did not comply with by-law 26 of the by-laws made under s. 157 of the Public Health Act, 1875, and then in force in the urban district of

St. George, in that it shewed that the party walls of the house were not intended to be carried up above the roofs of the adjoining houses as required by the said by-law; but notwithstanding such non-compliance the urban district council purported to approve the plan on June 12, 1896, and such approval was indorsed upon it.

The Bristol Improvement Act, 1847 (10 & 11 Vict. c. cxxix.), enacts by s. 35 that "all separate side walls or party walls shall be well and closely lined up to the under side of the slates upon the roof of the building, and the parapets, of the height and thickness as specified for party walls, shall be built on such side walls or party walls"; by s. 37, "every parapet wall and every party wall hereafter to be erected within the said city and county shall be carried up at least two feet above the slates or other covering of the roofs of the premises adjoining."

By-law 26 of the by-laws of the urban district of St. George, dated November 4, 1885, provided that the party wall of every new building should be of a certain thickness and should be carried up a specified height above the roof, flat, or gutter of the highest building adjoining.

By s. 15 of the Bristol Corporation Act, 1897 (60 & 61 Vict. c. ccxxx.), "All by-laws, rules and regulations and all orders (other than precepts) made by the urban district councils or the local authorities respectively (so far as they relate to the added area) under any Act of Parliament and in force at the commencement of this Act are hereby annulled, but all penalties incurred thereunder and all forfeitures which have ensued by reason thereof may be enforced and recovered by the corporation in like manner and in all respects as the same respectively might have been enforced and recovered by the respective councils and local authorities, as the case may be, in case this Act had not been passed, and shall be carried by the corporation to the credit of the district fund: Provided that all plans of new streets and of new buildings within the added area approved by the urban district councils or the local authorities respectively before the commencement of this Act shall be valid for the period of two years after that date, but at the expiration of

1899

YABBICOM v. KING.

that period fresh plans of such new streets and new buildings as shall not at that date have been commenced shall be deposited for the approval of the corporation, which plans shall be in conformity with the by-laws, rules and regulations in force within the city." By s. 30 the authority and jurisdiction of the corporation were extended over the whole city inclusive of the added area.

The appellant contended that, on the authority of *McIntosh* v. *Pontypridd Improvements Company* (1), the approval of the urban district council of St. George of a plan contravening the by-laws of the urban district of St. George was a nullity; that the proviso to s. 15 of the Bristol Corporation Act, 1897, applied to cases where the by-laws of the urban district of St. George differed from the by-laws, rules, and regulations in force within the city, and preserved for two years the right to build in accordance with approved plans complying with the by-laws of St. George, but that it did not make valid a plan which had been illegally approved; that the case must be regarded as though no plan had been approved by the urban district council; that the respondent's house must, therefore, comply with the Bristol Improvement Act, 1847; and that by ss. 35 and 37 of that Act the respondent was obliged to erect parapets on the party walls of his house, and to carry up the said party walls at least two feet above the slates or other covering of the roofs of the adjoining premises.

The respondent contended that as the district council of St. George had in fact approved of the plan of his house, he was entitled under the proviso to s. 15 of the Bristol Corporation Act, 1897, to build the house in accordance with the plan, and that the justices had no authority to inquire whether the plan did or did not comply with the by-laws of the urban district of St. George, nor whether the approval of the plan was or was not valid.

The justices were of opinion that the respondent's construction of s. 15 of the Bristol Corporation Act, 1897, was correct; they were also of opinion that ss. 35 and 37 of the Bristol Improvement Act, 1847, did not make it obligatory to build

(1) (1891) 61 L. J. (Q.B.) 164.

parapets on party walls of buildings erected in the city, but merely required that, if any parapets were built, they should be of the height and thickness therein specified.

The questions of law for the opinion of the Court were whether the construction placed by the justices on s. 15 of the Bristol Corporation Act, 1897, and ss. 35 and 37 of the Bristol Improvement Act, 1847, were correct.

Clavell Salter, for the appellant. There was no approved plan within the meaning of the proviso in s. 15 of the Act of 1897, for the St. George's Urban District Council had no power to waive compliance with their own by-laws; the approval which they in fact gave was a nullity: *McIntosh* v. *Pontypridd Improvements Company*. (1) The object of the proviso was to prevent the hardship which would be felt if builders, whose plans for buildings in the added area had been lawfully approved by the urban district council before the Act of 1897 came into force, were afterwards to be compelled to alter their plans and buildings in accordance with by-laws of the corporation which might in many respects differ from those of the district council. [He also cited *Baxter* v. *Bedford Corporation* (2)]

J. E. Bankes, for the respondent. The justices were right. The plan was deliberately approved by the then existing local authority, and was acted on. The Act of 1897 had the effect of a statutory contract between the parties, under which it was agreed that the plans should be valid for two years. "Approved" means "actually approved," and the St. George's District Council would have been estopped by their own act in approving the plan from taking proceedings against the respondent; the corporation can be in no better position for the purpose of taking these proceedings than the district council would have been.

[LAWRANCE J. referred to the judgment of Jessel M.R. in *Kerr* v. *Preston Corporation*. (3)]

Clavell Salter was not called upon to reply.

(1) 61 L. J. (Q.B.) 164. (2) (1885) 1 T. L. R. 424.
(3) (1876) 6 Ch. D. 463.

1899

YABBICOM v. KING.

DAY J. I am clearly of opinion that the case of *McIntosh* v. *Pontypridd Improvements Company* (1) was rightly decided, and that it is a binding authority upon us. I agree with the contention that the corporation of Bristol was in no different position from the St. George's District Council for the purpose of exercising any controlling authority they might have over this building; but I do not entertain the slightest doubt that the St. George's District Council was entitled at any time to take proceedings for breach of their by-law. The district council could not control the law, and by-laws properly made have the effect of laws; a public body cannot any more than private persons dispense with laws that have to be administered; they have no dispensing power whatever. In the present case the Bristol Corporation are not seeking to exercise any power other than that which the St. George's District Council previously possessed, and I think that the corporation were entitled to take the position that the respondent's plans were not in accordance with the by-laws; the suggested dispensation was not operative, valid, or effective. It is said that the respondent is protected by the proviso in s. 15 of the Bristol Corporation Act, 1897; but that proviso is dealing with plans not actually but lawfully approved; it does not give effect to invalid dispensations or to plans which contravene the by-laws. In other words, the effect of the proviso is that acts done under the by-laws are maintained, but not acts done in contravention of them. I think that the justices were wrong in holding as they did, and that our answer to the question asked us must be in the negative.

LAWRANCE J. I am entirely of the same opinion. "Approved" in s. 15 means "legally approved" by the St. George's Urban District Council, and the question is whether that body was acting under legal powers when it approved these plans. The point was decided in *McIntosh* v. *Pontypridd Improvements Company* (1), which is absolutely in point in the present case; the language used by Wright J. in his judgment is clear and express. The observations of Cave J. in

(1) 61 L. J. (Q.B.) 164.

1899

YABBICOM v. KING.

Lawrance J.

Baxter v. *Bedford Corporation* (1) are to the same effect. In my opinion the first duty of the Bristol Corporation in the present case was to see that the approval previously given to the plans by the urban district council was legal; and I have no doubt that under the circumstances it was illegal.

Judgment for the appellant.

Solicitors for appellant: *Robins, Hay, Waters & Hay, for Town Clerk, Bristol.*

Solicitors for respondent: *Meredith, Roberts & Mills, for Sibly, Bristol.*

W. J. B.

EDWARDS, APPELLANT; PURNELL AND OTHERS, RESPONDENTS.

1899
Jan. 23.

Weights and Measures—Coal—Ticket in Form in Schedule—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.

By s. 21 of the Weights and Measures Act, 1889, where coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller is therewith to deliver, or cause to be delivered, or sent by post or otherwise, to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note according to the form in the 3rd schedule to the Act.

By an agreement between a firm of coal merchants and the committee of an asylum all coal supplied to the asylum was to be weighed on the asylum weighbridge, and the weight there ascertained before delivery was accepted by the committee. At the time of weighing a cartload of coal in course of delivery at the asylum, the carter had in his possession a book of forms containing tickets in the form in the schedule, but in which the weights which were required to be entered were left in blank; at the conclusion of the weighing, and before any part of the coal was unloaded, the purchasers' storekeeper, in pursuance of the arrangement between the parties, filled in upon the ticket the weight of the coal and vehicle, the tare weight of the vehicle and the net weight of coal delivered; the ticket was then detached from the book, and handed by the carter to the storekeeper, and the coal was unloaded:—

Held, that the provisions of s. 21 had been complied with by the sellers,

---

(1) 1 T. L. R. 424.

1899

EDWARDS v. PURNELL.

and that they could not be convicted under that section for not delivering to the purchaser before any part of the coal was unloaded a ticket in the form in the 3rd schedule to the Act.

CASE stated by justices for the county of Devon upon an information under s. 21, sub-ss. 1 and 2, of the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21).

The information had been preferred by the appellant, an inspector appointed by the Devon County Council under the Weights and Measures Act, 1889, against the respondents, charging that they on June 14, 1898, being the sellers of a certain quantity of coal exceeding two hundredweight (such coal being delivered by means of a vehicle to a purchaser), did not deliver, or cause to be delivered, or sent by post or otherwise, to the purchaser or his servant, before any part of such coal was unloaded, a ticket or note according to the form in Sched. III. to the said Act, or according to a form to the like effect. After hearing the appellant and the evidence adduced by him, the justices dismissed the information without calling upon the respondents for their defence.

The following facts were proved or admitted at the hearing: The respondents were coal merchants carrying on business at Exeter, and were in the habit of supplying coal to the Devon County Asylum at Exminster (throughout this case called the "purchasers"). The committee of the asylum, who were members of and appointed by the county council, had a duly stamped and certified weighing machine (namely, a weigh-bridge) on their premises, and required all goods supplied to the asylum to be weighed on their weighbridge, and the weight there ascertained before delivery was accepted by them.

On June 14, 1898, the respondents, at the request of the purchasers, sent more than two hundredweight of coal (namely, one ton, three quarters) in bulk in one of their vehicles in charge of one of their carters to the asylum. The carter was provided with a ticket contained in a book of forms in accordance with the form contained in Sched. III. of the Act, with the exception that the weight of the coal and vehicle, the tare weight of the vehicle, and the net weight of the coal delivered to the pur-

chasers were not entered thereon, but were left in blank. Upon arrival at the asylum, the vehicle and coal contained therein were weighed upon the asylum weighbridge by the carter and the purchasers' storekeeper in pursuance of a standing arrangement between the purchasers and the respondents, and the storekeeper, at the request of the carter and acting for that purpose as his agent, filled in upon the ticket the weight of the coal and vehicle, the tare weight of the vehicle, and the net weight of the coal delivered to the purchasers. The ticket, after having been so filled in, and being then in the form contained in Sched. III., was detached from the book of forms and delivered by the carter to the purchasers' servant. Delivery of the coal was not accepted by the purchasers, nor was any part of it unloaded, until the ticket had been filled in and delivered to the purchasers' servant as aforesaid.

Upon the above facts the justices were of opinion that, it having been proved to their satisfaction that a ticket in the form contained in Sched. III. to the Act had been delivered by the respondents' servant to the purchasers' servant before any part of the coal was delivered or unloaded, they ought not to admit any evidence as to how or when the ticket had been filled up, considering that such evidence could only be material if the charge were one under s. 22 of the said Act relating to coal charged as being conveyed in bulk, and not in a case under s. 21, where the offence charged related to coal delivered whether in bulk or otherwise. The appellant, however, contended that the justices ought to go behind the ticket as delivered, and that the coal having been in fact sent out in bulk, though the charge was made under s. 21, the provisions of s. 22, sub-s. 1, should have been complied with, and no ticket could have been delivered as required by s. 21, and that the particulars as to weight not having been entered upon the ticket by the respondents or their servant, but by the servant of the purchasers, the ticket was not in the form contained in Sched. III. In consequence of this contention the justices admitted the evidence tendered by the appellant to the effect hereinbefore set out, but, being still of opinion that no offence had been committed under s. 21, sub-ss. 1 and 2,

1899

EDWARDS v. PURNELL.

of the Act as charged in the information, they dismissed it accordingly. (1)

The question for the opinion of the Court was whether the justices were right in point of law in dismissing the information.

Kerly (*Duke, Q.C.*, with him), for the appellant. The coal was sent out in bulk, and the provisions of s. 22 should have been complied with. The vehicle was not weighed, but only the coal and the vehicle together, and there was no means of testing the weight of the vehicle. The case of *Knowles* v.

(1) By 52 & 53 Vict. c. 21 (The Weights and Measures Act, 1889), s. 21, sub-s. 1, "Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the Third Schedule to this Act, or according to a form to the like effect."

By sub-s. 2, "If default is made in complying with the requirements of this section with respect to the delivery or sending of a ticket or note, or if the quantity of coal delivered is less than the quantity expressed in the ticket or note, the seller of the coal shall be liable to a fine not exceeding 5*l*."

By s. 22, sub-s. 1, "Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as of the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures, and being on or near to the place from which the coal is brought, and shall from time to time cause the tare weight of the vehicle to be marked thereon in such manner as the local authority approve."

By sub-s. 2, "In any such case the seller of the coal shall insert or cause to be inserted in the ticket required by this Act to be given by him a statement of the correct weight of the vehicle, or of the vehicle and of the animal drawing it where both are weighed together with the load, as well as of the correct weight of the coal contained in the vehicle."

The form in the 3rd schedule is as follows:—

"Take notice that you are to receive herewith tons cwts. lbs. of coal

"[*When sold in sacks, add*]
in sacks, each containing cwt.

"[*When sold in bulk, add*]

	Tons.	cwts.	lbs.
"Weight of coal and vehicle .			
"Tare weight of vehicle . .			
"Net weight of coal herewith delivered to purchaser .			

1899

EDWARDS v. PURNELL.

Sinclair (1) shews that the weight at starting from the seller's premises is that which must be looked to and which must be shewn on the ticket, not the weight on arrival at the purchaser's premises. The ticket must be prepared in advance by the seller; it is not a delivery of a ticket within the meaning of the statute if the ticket is in blank when the coal is delivered. It is immaterial that there was an arrangement between the parties as to the time and place of weighing, for the Act is absolute in its terms.

Foote, Q.C., for the respondent. The summons follows the language of s. 21, and there was clearly no offence under that section, whatever may have been the case as regards s. 22. But the latter section does not say that the ticket may not be filled up at the purchaser's premises; and there was no evidence before the justices that the coal was not weighed at or near the seller's premises—a course which would naturally be adopted for the seller's own protection. *Knowles* v. *Sinclair* (1) only decided that it was a sufficient compliance with the section if the coal was weighed before it was sent out; it did not decide that such a weighing was necessary.

Kerly, in reply.

LAWRANCE J. I think that in this case all the requirements of s. 21 have been complied with. When coal is brought out of the yard of the seller, it is not necessary that its weight should be at that moment taken by his servant; there are, no doubt, coal merchants who have not a weighing machine on their own premises, and this appears to be recognised by the Act, which in s. 26 gives the local authority power to erect public weighing machines on which the coal and the vehicle containing it may be weighed. The statute is not intended to protect the seller against the acts of his servants, but to protect the purchaser by providing a means by which he can know when he gets the full and proper weight of coal. In the present case there was an agreement between the seller and the purchaser as to the mode and place of weighing, which was a condition precedent to the acceptance by the purchaser of the

(1) [1898] 1 Q. B. 170.

1899

EDWARDS v. PURNELL.

coal, and this agreement was carried out. I think that this appeal should be dismissed.

CHANNELL J. I agree that the justices were right in their decision. The question arises under s. 21, which provides in substance that where more than two hundredweight of coal is delivered by means of a vehicle to a purchaser, a ticket must be sent or delivered to the purchaser before any part of the coal is unloaded. That was done here: a ticket was delivered by the seller's servant to the purchaser's servant before the unloading of the coal. But a difficulty is said to have arisen as to the mode in which the ticket was filled up, and authority for the appellant's contention is said to be found in *Knowles* v. *Sinclair* (1), which was a decision of my brother Hawkins and myself. The argument in that case was that the ticket must contain a correct statement of the weight delivered; but the Court negatived that contention, and held that it must be a correct statement of the weight at some previous weighing; the Court was there contemplating the ordinary case of the coal being weighed at or near the seller's premises, for generally there is no weighing machine at the premises of the purchaser. The ticket delivered has reference only to the weighing, which in the present instance was by agreement at the purchaser's premises. There may perhaps not have been an exact compliance with the requirements of s. 22; if that be so, the proceedings should have been under that section. As it is, I think that this proceeding was entirely misconceived; it probably was based upon a misunderstanding of the case of *Knowles* v. *Sinclair*. (1)

Judgment for the respondent.

Solicitors for appellant: *Ford, Lloyd, Bartlett & Michelmore, for Michelmore, Exeter.*

Solicitors for respondent: *Coode, Kingdon & Cotton, for Orchard, Exeter.*

(1) [1898] 1 Q. B. 170.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
Jan. 27.

HODSON AND ANOTHER *v.* PARE.

Defamation—Privilege—Judicial Proceeding—Petition for Order for Reception of Lunatic—Defamatory Statement in Particulars—Immunity from Action—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5).

A justice of the peace, or other judicial authority, to whom an application is made, under the Lunacy Act, 1890, on a petition for an order for the reception and detention of a lunatic, is acting judicially, and consequently defamatory statements made in the course of the proceedings are not actionable.

APPEAL from an order of a judge at chambers under Order XXV., r. 4, reversing an order of a master striking out the statement of claim on the ground that it disclosed no reasonable cause of action, and dismissing the action.

It appeared that the defendant applied under the Lunacy Act, 1890, for an order for the detention of his wife as a lunatic. By s. 4, sub-s. 2, of the Act such an order shall be obtained upon a private application by petition accompanied by a statement of particulars and by two medical certificates. In the 2nd schedule a form is given for the statement of particulars, and one of the matters as to which information is to be given is "whether any near relative has been afflicted with insanity."

The defendant, in his particulars in reply to this requisition, made the following statement: "Yes, her mother, with puerperal fever." This action was brought by the person referred to in this statement and her husband, on the ground that the statement was libellous. The defendant applied at chambers under Order XXV., r. 4, for an order that the statement of claim should be struck out on the ground that it disclosed no reasonable cause of action, and that the action should be dismissed. The master before whom the summons came made an order as prayed. On appeal the learned judge was of opinion that the matter was not one that should be decided at chambers, and reversed the order of the master.

The defendant appealed.

C. A. 1899

HODSON v. PARE.

R. M. Bray, Q.C., and *Willoughby Williams*, for the defendant. There are two grounds on which the action should be dismissed—that the occasion was privileged, and that the words are not capable of a defamatory meaning. It is quite clear that nothing stated in the course of a judicial proceeding can be made the subject of an action for defamation, and the whole scope of the Lunacy Act, 1890, shews that applications under that Act are made to a judicial authority exercising judicial functions. Sect. 9, sub-s. 2, shews this clearly, for "every judicial authority shall, in the exercise of the jurisdiction conferred by this Act, have the same jurisdiction and power as regards the summoning and examination of witnesses, the administration of oaths, and otherwise, as if he were acting in the exercise of his ordinary jurisdiction." The case is, therefore, one in which the summary jurisdiction of the Court to stay the action should be exercised.

[They cited *Lilley* v. *Roney*. (1)]

Blake Odgers, Q.C., and *Etherington Smith*, for the plaintiffs. *Lilley* v. *Roney* (1) was a case of an inquiry which would lead to judicial proceedings. The present case arises on an administrative order made by a justice for the preservation of peace in his district. There was a proceeding before the justice to obtain an authority to detain the alleged lunatic. That proceeding was not in public, there was no evidence on oath, no opportunity to examine witnesses, no attendance of the alleged lunatic or any one on her behalf, and no notice to attend, and the order made by the justice did not affect the status of the lunatic. It is true that the justice might, in his discretion, have directed further proceedings; but if he was conducting a judicial inquiry such proceedings would have been essential, and they cannot be insisted on by the lunatic or any one on his behalf. Merely calling the person who is asked for an order a judicial authority does not make his act judicial, and the term is merely descriptive of the person who may exercise the authority. The power of the Court to stay an action under Order XXV., r. 4, ought only to be exercised in a plain and obvious case: *Hubbuck &*

(1) (1892) 61 L. J. (Q.B.) 727.

Sons v. *Wilkinson, Heywood & Clark* (1); and the Court will not summarily decide such a matter as the present one.

As to the words not being defamatory, they are capable of a libellous meaning, and the case should not be withdrawn from a jury.

[They cited *Royal Aquarium Society* v. *Parkinson.* (2)]

Willoughby Williams, in reply.

A. L. SMITH L.J. This is an appeal from an order of a judge at chambers on an application under Order XXV., r. 4.

The action is for libel, and the statement of claim is well and truthfully drawn and raises the real question to be decided, which is whether the statement complained of as libellous was made in the course of a judicial, or merely of an administrative proceeding, before a justice of the peace. If in a judicial proceeding, it cannot be disputed that the occasion is absolutely privileged; whether the proceeding was judicial or not depends on the provisions of the Lunacy Act, 1890.

Turning to that Act, we find by s. 4, sub-s. 1, that a private person not found lunatic by inquisition is to be received and detained as a lunatic in an institution for lunatics, or as a single patient, only under a reception order made by a judicial authority. Sect. 9 defines the judicial authority. The powers of the judicial authority under the Act are to be exercised by a justice of the peace specially appointed, or by a judge of county courts, or by a magistrate having respectively jurisdiction in the place where the lunatic is. By sub-s. 2, every judicial authority is to have, in the exercise of the jurisdiction conferred by the Act, the same jurisdiction and power as regards the summoning and examination of witnesses, the administration of oaths, and otherwise as if he were acting in his ordinary jurisdiction. It is suggested that this means nothing more than that the justice, county court judge, or magistrate is to perform administrative duty as in the case of the London County Council when meeting to grant music and dancing licences, as was decided in *Royal Aquarium Society* v. *Parkinson.* (2)

It appears to me to be clear that, in the case we have to

(1) Ante, p. 86. (2) [1892] 1 Q. B. 431.

C. A. 1899

HODSON v. PARE.

A. L. Smith L.J.

consider of an order made under s. 4 of the Lunacy Act, 1890 the act of making the order is judicial and not administrative. It is said in opposition to this view that the evidence is not taken on oath, but that the decision may be given on medical certificates; but by s. 28, sub-s. 4, every medical certificate made under the Act is to be evidence of the facts therein appearing, as if those facts had been verified on oath, and by s. 317, sub-ss. 1 and 2, a wilful misstatement of a material fact in a petition or statement of particulars, or in a medical certificate, is a misdemeanour. Then it is said that the alleged lunatic was not personally before the justice; but that cannot make any difference as to the question of privilege. Many orders are made by justices, acting in judicial proceedings, on ex parte applications, and statements made at such a time are not actionable. Another argument was that the order did not alter the status of the person as to whom it is made; but, as long as the order stands, it appears to me that it does alter his status, for he is no longer a free, but is what I may term a detained person.

I have come to the conclusion that a justice sitting to administer the lunacy laws, as in this case, is exercising a judicial function; and, if that is true, the occasion was absolutely privileged, and statements made in the course of the proceedings are not actionable. I think, therefore, that the case comes within Order XXV., r. 4, and that the appeal must be allowed.

CHITTY L.J. I am of the same opinion. The point whether the order of a justice for the detention of a lunatic person is a judicial or an administrative act depends on the provisions of the Lunacy Act, 1890. In my opinion the answer can only be that under the statute it is a judicial proceeding. It commences with a private application by petition to be signed by the petitioner. The petition is to be accompanied by two medical certificates and by a statement of particulars, following the Form No. 2 in the 2nd schedule to the Act. The words attacked as defamatory were used in answer to one of the questions set out in that form.

It is said truly that the justice before whom the application comes can make an order without having before him any evidence on oath; but that is not conclusive of the matter. The statute has declared in s. 28 that the certificates shall be evidence of the facts therein appearing and of the judgment therein stated to have been formed by the certifying medical practitioners as if those matters had been verified on oath. By s. 317, a person making a wilful misstatement in a petition, statement of particulars, or certificate is guilty of a misdemeanour. The Legislature, therefore, proceeded on the principle of guarding the proceedings by subjecting a person who makes, in the course of them, a wilful misstatement, to the penalty attaching to a misdemeanour, and that was considered a sufficient protection. Further, the justice, although he may make an order on the petition and the certificates, if he is satisfied that an order may be properly made forthwith, has ample power to personally examine the alleged lunatic and to call for the production of further evidence, and to hear that evidence on oath. There is thus a statutory judicial proceeding with proper safeguards, and, if so, nothing stated in the course of that proceeding can be actionable. Applying this conclusion to the case before us, it follows that it is a case in which the plaintiff cannot succeed, and in which it is proper to make an end of the action.

I may add that the case of *Royal Aquarium Society* v. *Parkinson* (1), to which reference has been made, arose out of the transfer to the county council of administrative duties theretofore exercised by justices.

Appeal allowed.

Solicitors for plaintiffs: *Indermaur & Brown, for Clifford & Perkins, Loughborough.*

Solicitors for defendant: *Dalston, Son & Elliman, for Turner, Barrows & Moss, Nottingham.*

(1) [1892] 1 Q. B. 431.

A. M.

C. A.
1899
Jan. 13.

[IN THE COURT OF APPEAL.]

In re THOMAS.
Ex parte SHERIFF OF MIDDLESEX.

Bankruptcy — Receiving Order — Sheriff — Execution — Sale — Poundage — Sheriffs Act, 1887 (50 & 51 *Vict. c.* 55)—*Order as to Fees of August* 31, 1888—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 1.

A sheriff's officer is not entitled to poundage where, after he has seized goods in execution under a fi. fa., a receiving order is made against the judgment debtor and the goods are delivered to the official receiver or trustee in bankruptcy in pursuance of s. 11, sub-s. 1, of the Bankruptcy Act, 1890.

APPEAL of the sheriff of Middlesex from the decision of the Divisional Court. (1)

Muir Mackenzie, for the sheriff. The sheriff is entitled to poundage as part of his costs of execution. By s. 11, sub-s. 1, of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), which was substituted for s. 46, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the costs of execution are made a first charge on the goods or money delivered to the official receiver before sale by the sheriff, and the question is whether poundage is part of the "costs of execution" within s. 11, sub-s. 1, of the Act of 1890. The sheriff's costs of execution, including his poundage, are now regulated by the Order as to Fees of August 31, 1888, under the Sheriffs Act, 1887, set out in the note to the report in the Court below (Annual Practice, 1899, vol. ii. p. 236, et seq.; Yearly Practice, 1899, p. 834). By Rule 11 of the order, "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order"—including No. 11, the poundage fee—"shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be." The fees allowed to the sheriff under the Act of 1887 are extended beyond what had been previously allowed. Even

(1) Ante, p. 66, where "Middlesex" should be read for "Essex."

before the order under the Act poundage was payable without a sale.

[LINDLEY M.R. Is not *Sneary* v. *Abdy* (1) the other way—no sale, no poundage?]

That was a case under the old law: now poundage is payable in any event if the execution is stopped, and by the person at whose instance it is stopped. In the recent case of *Madeley* v. *Greenwood* (2) it was distinctly held that where the sale is withdrawn or the sheriff stopped from selling he is entitled to the same fees as if the execution had been completed. Therefore, if the sale is stopped by the official receiver or trustee, he, as being "the person at whose instance the sale is stopped," must pay the sheriff's fees, including poundage. The power and duty of the sheriff to sell remain unaffected if no request is made to him to deliver the goods to the official receiver or trustee: *Trustee of Woolford's Estate* v. *Levy*. (3) It is the request to deliver that stops the sale, and therefore, according to the present rule, the sheriff ought to have his poundage out of the estate.

[LINDLEY M.R. mentioned *Lee* v. *Dangar*. (4)]

That was a different case from the present. The old law disentitling the sheriff to poundage where there was no sale, as in *Miles* v. *Harris* (5), does not now prevail. But even under the old law, if the sale was stopped by a compromise, of which the plaintiff, the judgment creditor, got the benefit, the sheriff was entitled to his poundage. Now, however, he has his poundage where the sale is stopped not merely by the execution creditor, but by any person, and it is to that person he is to look for payment.

With regard to the cases that may be cited by the respondent, *In re Ludmore* (6) was decided before the new Act and rules, and is no longer applicable. *In re Harrison* (7) deals with a different fee altogether—the possession fee.

[LINDLEY M.R. *Alchin* v. *Wells* (8), cited in *Miles* v.

(1) (1876) 1 Ex. D. 299.
(2) (1897) 42 Sol. J. 34.
(3) [1892] 1 Q. B. 772, 779, 780.
(4) [1892] 1 Q. B. 231; 2 Q. B. 337.
(5) (1862) 12 C. B. (N.S.) 550.
(6) (1884) 13 Q. B. D. 415.
(7) [1893] 2 Q. B. 111.
(8) (1793) 5 T. R. 470.

C. A. 1899

THOMAS, *In re.* MIDDLESEX (SHERIFF OF), *Ex parte.*

Harris (1), is an authority that, under the old law, the sheriff was entitled to poundage before sale where the parties compromised, but that was because the plaintiff, the creditor, had had the benefit of the sheriff's services.]

This is pointed out by Willes J. in *Miles* v. *Harris.* (2) But apart from the former law, the sheriff relies on the wide terms of rule 11.

J. D. Crawford, for the respondent (the trustee in bankruptcy), was not called upon.

LINDLEY M.R. In my opinion, the decision appealed from is perfectly correct. I will take the case by steps. Apart from the Rules as to Fees under the Sheriffs Act, 1887, the sheriff has no case at all, to my mind; that is as plain as anything can be. The sheriff has seized, no doubt, but he has not sold. As he has not sold, it has been by law settled for years that he is not entitled to poundage. I am aware that there has been a qualification on that where the sheriff has seized but has not sold in consequence of a compromise between the parties: there the law regards him as having secured the money for the creditor, and therefore gives him his poundage. That was so decided in *Alchin* v. *Wells* (3); and *Madeley* v. *Greenwood* (4) appears to be a decision to the same effect. In the latter case, if the money had not been obtained for the creditor the decision would have been wrong. Here no one has obtained any money by means of what the sheriff has done, and therefore, apart from the rules under the Act of 1887, no poundage is payable to him at all. That is consistent with the cases that have been cited to us, such as *In re Ludmore* (5) and *In re Harrison.* (6)

But Mr. Mackenzie has another string to his bow, for he says poundage is given to the sheriff by the rules under the Act of 1887: these rules, he says, are more beneficial to him. The old cases that have been referred to, of course, do not touch these rules. By s. 20, sub-s. 2, of the Act power was given to

(1) 12 C. B. (N.S.) 550.
(2) 12 C. B. (N.S.) 559.
(3) 5 T. R. 470.
(4) 42 Sol. J. 34.
(5) 13 Q. B. D. 415.
(6) [1893] 2 Q. B. 111.

the Lord Chancellor and other persons—a power now vested in the Rule Committee—to make rules; they accordingly made the rules of August 31, 1888, fixing the fees to be received by the sheriff. These rules set out by way of schedule the fees which may be demanded by the sheriff. The fees are "for execution under writs of fieri facias." First come the fees for seizure, then for mileage, possession, removal of goods, and so on. Then No. 11, the last of the items, says this: "Sheriff's poundage and the fee for delivery of the writ to the undersheriff shall be the same as before the making of this order."

Now, pausing there for a moment, there is not a word here that the sheriff shall be entitled to poundage if he does not sell: it is rather the other way, for there is no alteration of the former law to that effect. What the rule says is that the sheriff's poundage and the fee for delivery of the writ shall be the same as before. It would seem from the language of the rules that the sheriff is not to receive any poundage if there is no sale, so that in that case there is no alteration. The right of the sheriff to poundage was given to him by a statute of Elizabeth (29 Eliz. c. 4), the poundage being payable to him on sale or on realization of the money without sale. Then the order continues: "The foregoing fees, numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, shall be levied in every case in which an execution is completed by sale." Now, there has been no sale here. Then it goes on: "In every case where an execution is withdrawn, satisfied, or stopped, the fees under this order shall be paid by the person issuing the execution, or the person at whose instance the sale is stopped, as the case may be." Now, as to those last words, "or the person at whose instance the sale is stopped," Mr. Mackenzie's construction appears to be right, having regard to the case of *Trustee of Woolford's Estate* v. *Levy* (1), and the official receiver or trustee in bankruptcy who stops the sale must pay the fees: but that does not carry him through. He says the order is precise—"the fees under this order shall be paid"; and he says that means all the fees enumerated above, whether earned or not. But that is wholly unreasonable, as is apparent from the list of fees itself. The

(1) [1892] 1 Q. B. 772.

C. A. 1899

THOMAS, *In re.* MIDDLESEX (SHERIFF OF), *Ex parte.*

Lindley M.R.

only sensible construction is that the fees to be paid are the fees which have been earned at the time of the stoppage, and poundage is not one of them. There is nothing carrying the rules further than the costs of execution under the old rules. It is absurd to say that fees not earned are to be paid. The decision of the learned judge below was perfectly right, and the appeal must be dismissed with costs.

RIGBY L.J. I am of the same opinion. How is poundage earned under this order? Only by complying with the conditions under the order, and it is earned only on a sale. There is an exception where the sheriff is entitled to poundage in cases where he has not sold, as in *Alchin* v. *Wells* (1); but this is not a case falling within that exception.

VAUGHAN WILLIAMS L.J. Poundage is a fee which is given by the statute of Elizabeth. Now, the language of the statute left it an open question whether the sheriff was entitled to poundage, because the word was simply "levy." It was decided —I forget the name of the case—even earlier than *Miles* v. *Harris* (2), that the word "levy" in the statute meant "turning the goods into money"; and Erle C.J., in giving judgment, said (3): "The question is, whether a *seizure* of goods under the fi. fa. is a *levy* within that statute (29 Eliz. c. 4). I am of opinion that the sheriff has not levied so as to be entitled to poundage under that statute, until the goods seized have been turned into money."

There has been no departure in any of the cases from that rule. It is quite true that, where the execution creditor has stopped the sale because he has got his money, that has been held to be within the equity of the statute—that is to say, having got the benefit he must bear the burden: but that has no application here. Rule 11 has given the sheriff certain fees, and it cannot be really denied that the fees there given are fees earned down to the time of the notice demanding possession; and it is laid down in the case I have just cited

(1) 5 T. R. 470. (2) 12 C. B. (N.S.) 550.
(3) 12 C. B. (N.S.) 558.

that poundage has not been earned if the goods have not been turned into money.

Appeal dismissed.

Solicitors: *Powell & Skues; Charles A. Bannister & Reynolds.*

G. I. F. C.

C. A. 1899

THOMAS, *In re.* MIDDLESEX (SHERIFF OF), *Ex parte.*

[IN THE COURT OF APPEAL.]

C. A. 1899 *Jan.* 19.

NEWBY *v.* ECKERSLEY.

Landlord and Tenant—Agreement as to Compensation—Tenant giving up Possession before Expiration of Term—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *s.* 57.

A tenant of agricultural land and his landlord agreed that the land should be given up before the expiration of the term, and that the tenant should receive compensation in respect of feeding stuffs, which is an improvement comprised in the 1st schedule to the Agricultural Holdings Act, 1883, and of three other matters not mentioned in the Act. The amount to be paid was to be ascertained by two valuers appointed by the landlord and the tenant respectively. In an action by the tenant to recover the amount agreed on by the valuers:—

Held, that such an agreement between landlord and tenant is not prohibited by the Agricultural Holdings Act, 1883; that the claim not being for compensation under the Act, the procedure under the Act did not apply to it; and that the plaintiff was entitled to recover in the action.

APPEAL from a judgment of Lawrance J. at the trial of the cause with a jury.

The plaintiff was tenant to the defendant, and he set up an oral agreement that, if he would waive his right to the six months' notice provided for by his lease, and deliver possession of the demised premises at the termination of the current year of the demise, the defendant would pay him such sum as might be found, by two valuers to be appointed by the plaintiff and defendant respectively, to be a reasonable compensation in respect of (1.) purchased feeding stuffs consumed on the premises; (2.) the value of hay left thereon; (3.) a new floor to the barn; (4.) the cost of manuring eight acres. The plaintiff's case was that he accordingly quitted the farm, and that the valuers met and assessed the amount of

C. A. 1899

NEWBY v. ECKERSLEY.

compensation in respect of these four matters, and he sued to recover that amount. The defendant set up an agreement differing from that set up by the plaintiff; but the jury by their findings affirmed the agreement as set up by the plaintiff. A tender of the amount of the items (2.), (3.) and (4.) had been made and refused. A question was raised by counter-claim as to dilapidations, but is not material to this report, and further reference to it is omitted from the arguments and judgments.

A verdict was given for the plaintiff for the amount claimed, and judgment was entered accordingly.

The defendant appealed.

A. T. Lawrence, Q.C., and *R. A. Shepherd*, for the defendant. The first item which the plaintiff claims is mentioned in the 1st schedule, Part III. (23), to the Agricultural Holdings Act, 1883, and compensation in respect of it cannot be recovered by action. By s. 57 a tenant cannot claim compensation otherwise than in manner authorized by the Act in respect of any matters that come within the Act (1), and the way in which money which has been "agreed or awarded or ordered on appeal" to be paid for compensation is to be recoverable is, under s. 24, by order of a county court. If the money claimed in respect of feeding stuffs was "agreed" or "awarded," it comes within this section. The Act, no doubt, by s. 7 provides that the tenant shall give two months' notice in writing to the landlord of his intention to claim; but that is a provision in favour of the landlord, and may be waived by him. The agreement was in fact a waiver of this condition, and the proceedings before the valuers were under the Act, and the money can only be recovered by the machinery provided by the Act.

Cyril Dodd, Q.C., and *G. J. Banks*, for the plaintiff, were not called on.

(1) 46 & 47 Vict. c. 61, s. 57: "A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, but where he is not entitled to compensation under or in pursuance of this Act he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if this Act had not passed."

A. L. SMITH L.J. This is an appeal in a case tried before my brother Lawrance with a jury. The action is by an outgoing tenant, and he claims compensation in respect of four matters, only one of which is named in the schedule to the Agricultural Holdings Act, 1883, as a subject for compensation, the other three being outside the Act. It appears that negotiations took place as to the tenant going out of his farm before his tenancy expired, and the sole question fought at the trial was whether there was an agreement for good consideration that on the plaintiff going out he should be paid compensation. The jury were asked whether there was such an agreement, and they have answered that question in the affirmative, and their finding is not impeached. The plaintiff alleges that on this bargain the defendant has not paid him compensation, although valuers were appointed who agreed as to the amounts that should be paid. The defence raised by the defendant is that the action cannot be brought in the common law courts because on the true construction of the Agricultural Holdings Act a landlord and tenant are prevented, in all matters in which compensation can be claimed under the Act, from bargaining as to the terms on which the latter shall go out. Speaking for myself, I cannot see that in the Act.

It is suggested that in s. 57, taken with the prior sections, there must be read an absolute prohibition of such a bargain as was found by the jury in this case. If it had been intended in this Act that there should be such a prohibition, I should have expected to find a section directly creating the prohibition. Sect. 57 does not contain such a prohibition. Is it to be found elsewhere in the Act? Sects. 1 and 2 deal with the general right to compensation under the Act; and, coming to s. 7, we find that a tenant claiming compensation under the Act is to give two months' notice in writing of his intended claim. The ruling words of this section, and, as I think, of subsequent sections, are "under this Act." Where a tenant proposes to claim compensation under the Act he must give two months' notice, and if he does not do so he is at mercy. In s. 8 we find that the landlord and tenant may agree on the amount and mode and time of payment of compensation to be

C. A. 1899

NEWBY v. ECKERSLEY.

A. L. Smith L.J.

paid under this Act. Then follow provisions as to arbitration, all dealing with claims to compensation under the Act. In like manner in s. 57, the "tenant" referred to must be a tenant claiming compensation under the Act. It is not the plaintiff's case here that he is claiming compensation under the Act, nor is the agreement one within s. 55 depriving the tenant of any right to claim compensation under the Act. The tenant's case is that there was an express bargain for good consideration—that, if he went out at the request of the landlord, he should be paid compensation in respect of four things, of which three were not within the Act but one was. I cannot see any provision in the Act or any rule of law prohibiting the landlord and tenant from making such a bargain as was made in this case. The appeal must be dismissed.

CHITTY L.J. The plaintiff claims on a special agreement, and it is suggested that this agreement is invalidated by the Agricultural Holdings Act, 1883. I do not read the Act as containing anything which prevents the making of such an agreement as was made in this case. The landlord agreed to give compensation in respect of certain matters in respect of some of which he was not bound to make compensation under the Act, and the mode of ascertaining the sums to be paid was not that provided by the Act even if all the items had fallen within it. Consequently this was not a reference under the Act. It is not necessary to go through the sections again. I agree that they shew that s. 57 applies to a tenant claiming compensation under the Act.

COLLINS L.J. I am of the same opinion. I may say at the outset that I do not understand that the landlord says that the tenant cannot get compensation. All that he says is that whatever the plaintiff is to have he must obtain it by the machinery provided by the Act.

The point raised is that the particular machinery of the Act has not been followed, and that the plaintiff cannot recover in this action. Whether this is so or not depends on whether the right of the tenant is under the Act, or by agreement outside the

Act. It is said that the agreement in this case, though made for good consideration, cannot be enforced because, looking at all the sections of the Act, it provides a way in which the tenant must obtain compensation in respect of any matter within the Act, and therefore he cannot bring an action. Here the tenant has no rights under the Act. The matter arises because the landlord, having no right to turn the tenant out, applied to him to have the tenancy terminated upon the terms that certain matters of compensation should be dealt with in a certain way. It is suggested that this agreement merely amounted to a waiver by the landlord of the necessity for giving two months' notice of claim under the Act. My answer to that is that there has been no waiver. A waiver is the withdrawing of a condition necessary for the assertion of a right. In the present case nothing of the sort has happened, but an entirely different right has been bargained for, and the condition as to notice does not apply to that bargain. Sect. 57 has been relied on as shewing that the tenant cannot recover; but the answer is that that section applies to a tenant claiming under the Act, and that the plaintiff is not doing so, but is claiming under the agreement.

Appeal dismissed.

Solicitor for plaintiff: *Ikin, for Harry A. Child, Leeds.*

Solicitors for defendant: *Throwgood, Tabor & Hardcastle for Bond, Banwick & Peake.*

A. M.

1899
Jan. 25.

JONES *v.* BIERNSTEIN.

Landlord and Tenant—Distress—Goods Impounded on Premises—Man in Possession—Distress for Rent Act, 1737 (11 *Geo.* 2, *c.* 19), *s.* 10.

Where goods distrained for rent by a landlord have been impounded on the premises under 11 Geo. 2, c. 19, s. 10, it is not requisite that any one on the landlord's behalf should be left in possession of the goods.

APPEAL from the Southwark County Court.

The plaintiff was the owner of 151, Fentiman Road, Clapham, which was let to one Morrisey at a rent of 50*l.* per annum upon an agreement.

On July 13, 1898, the rent being in arrear, the plaintiff distrained on the premises and (as the county court judge found) did everything that was required for impounding the goods on the premises within the meaning of 11 Geo. 2, c. 19, s. 10, and a man was left in possession. On Saturday night this man left the premises, and did not return till Monday. During his absence the defendant, who was the true owner of some of the goods distrained, entered the house and removed his goods. In an action of pound breach the county court judge found that the man in possession had no reasonable necessity for his absence, and that he had therefore abandoned possession, but that as he had intended to return he had not abandoned the distress, and might be considered as in constructive possession. He, however, held that real possession was necessary, and entered judgment for the defendant.

J. D. Crawford, for the plaintiff. The county court judge was wrong. Where the goods distrained have once been impounded real possession is not necessary. Before the Act of George II. the goods distrained must be taken to a public pound and there impounded, and it was not necessary that any person should be left in possession. By the 11 Geo. 2, c. 19, s. 10, which was passed in the interest of the tenant, the distrainor might impound the goods on the premises, and there

is nothing in that statute to shew that possession is necessary. As soon as the goods have been impounded they are in the custody of the law, and the retention of possession by the distrainor is unnecessary. This applies equally whether the goods are in a public pound or are impounded on the premises: Co. Litt. 47 b; *Parrett Navigation Co.* v. *Stower* (1); *Cotsworth* v. *Betison.* (2) A mere declaration by the person distraining that the goods are impounded is sufficient if the tenant assents: *Washborn* v. *Black* (3); *Swann* v. *Earl of Falmouth* (4); *Firth* v. *Purvis* (5); *Kemp* v. *Christmas.* (6)

H. D. Greene, Q.C. (*Schwabe* with him), for the defendant. The retention of possession was a necessary part of the distress. This is certainly so where goods have been seized under a fi. fa. by the sheriff: *Bagshawes* v. *Deacon* (7); *Lumsden* v. *Burnett* (8); and it would seem from the latter case that distraint by the landlord and execution by the sheriff are on the same footing. The Act of George II. provides that the distrainor may "impound or otherwise secure the distress . . . . in such place or on such part of the premises . . . . as shall be most fit and convenient for the impounding and securing such distress." That therefore gives the landlord the option of "impounding" —that is to say, locking up the goods in a particular room, or "otherwise securing," as by leaving a man in possession. The goods here were not impounded at all. They were seized, but that is not sufficient, and the only way in which they were "otherwise secured" was by the presence of the man in possession. The impounding must be a definite act which is sufficient to shew that the goods are in custodiâ legis: *Tennant* v. *Field.* (9) The action for pound breach will not lie unless it is shewn that the goods were impounded or otherwise secured within the meaning of the statute of George II.: *Thomas* v. *Harries.* (10)

Crawford was not called upon to reply.

(1) (1840) 6 M. & W. 564.
(2) (1696) 1 Ld. Raym. 104.
(3) (1774) 11 East, 405, n.
(4) (1828) 8 B. & C. 456.
(5) (1793) 5 T. R. 432.
(6) (1898) 79 L. T. 233.
(7) [1898] 2 Q. B. 173.
(8) [1898] 2 Q. B. 177.
(9) (1857) 8 E. & B. 336.
(10) (1840) 1 Man. & G. 695.

1899

JONES v. BIERNSTEIN.

LAWRANCE J. The question raised in this case which we are called upon to decide is whether, as against the true owner of goods taken in distress, real possession is necessary. The county court judge finds that everything required by the statute of George II. was done to make a good distress, but that the man who was left in possession abandoned possession though he did not abandon the distress, and he decides that real possession is necessary. I think that the county court judge came to a wrong conclusion. I cannot see that the true owner of the goods stands in any different position from the tenant on whose premises the goods were seized. I do not think it was necessary that notice of the distress should be given to the true owner of the goods, but as a matter of fact—there is no dispute about the facts—such notice was given. The only question we have to decide is whether it was necessary that the man should remain in real possession of the goods after they had been seized and impounded. I do not think so. After the goods had been seized and impounded it seems to me, on the authority of *Bannister* v. *Hyde* (1), to which my brother Channell has called my attention, that it is not necessary that any one should remain on the premises on behalf of the landlord at all. As to that there seems to be plenty of authority. It is not necessary for us now to decide what acts will amount to an impounding, since the county court judge finds as a fact that these goods were impounded. I have therefore no hesitation in saying that the county court judge was wrong in holding that, where goods had been impounded on the premises in accordance with the statute of George II., physical or real possession on the part of the landlord was necessary to sustain an action for pound breach. There must, therefore, be judgment for the plaintiff.

CHANNELL J. I am of the same opinion. The action is brought for pound breach, and therefore, in order to succeed, the plaintiff must shew that the goods, at the time that they were taken away by the defendant, were in custodiâ legis. The question raised at the trial in the county court was whether

(1) (1860) 2 E. & E. 627.

it was necessary, in order that the goods should be kept in custodiâ legis, that the party interested—that is to say, the landlord—should retain actual possession of them. It appears to me to be quite clear from the authorities that when once the goods are in custodiâ legis the actual retention of possession by the party distraining on them is not necessary. If the distress is abandoned, of course the custody of the law ipso facto ceases. The case of *Bannister* v. *Hyde* (1) states clearly that where goods have been impounded and a man has been left in possession, his subsequent withdrawal is evidence, but evidence only, of an intention to abandon the distress.

When the goods have once been impounded, as the county court judge finds was the case here, there is, I think, no difficulty. The question, however, of what amounts to an impounding is a difficult one, and one which we are not called upon now to decide. Considering the length of time that has elapsed since the Act was passed, there are very few decisions upon it. Although there may be some cases where taking possession and not retaining possession without anything more is insufficient, I should think that in the general way the mere fact of taking possession of the goods is sufficient for the purposes of the statute. As has been pointed out, the seizing of goods is an act done once for all, and when notice of possession is given that may be sufficient to constitute an impounding within the statute of George II. But, as I have said, that question is not left to us, as the county court judge has found as a fact that these goods were impounded, and that there was no abandonment of the distress. In *Kemp* v. *Christmas* (2) it is worthy of note that it was assumed that, notwithstanding that the man in possession had gone out of possession, an action for pound breach could be maintained. It was not discussed, it is true, but it was assumed. I agree, therefore, that judgment must be entered for the plaintiff.

Judgment for the plaintiff.

Greene, Q.C., applied for leave to appeal.

(1) 2 E. & E. 627.

(2) 79 L. T. 233.

1899

JONES v. BIERNSTEIN.

CHANNELL J. You may have leave, although it must not be assumed that our judgment, which proceeds on the special facts found by the county court judge, raises any question of general importance.

Solicitor for plaintiff: *C. J. Parker.*
Solicitor for defendant: *H. E. Tudor.*

A. P. P. K.

1899
Feb. 11, 13.

WIX AND OTHERS *v.* RUTSON.

Landlord and Tenant—Lease—Covenant to bear Charges—Charge upon Landlord in respect of Premises—Expenses of paving New Street—Claim by District Board—Payment by Landlord—Right to recover from Tenant—Metropolis Management Acts, 1855, 1862 (18 & 19 *Vict. c.* 120, *ss.* 105, 250; 25 & 26 *Vict. c.* 102, *ss.* 77, 96).

By a covenant in a lease of land in the metropolis the tenant was liable to bear, pay, and discharge, charges, duties, assessments, and impositions, charged, assessed, or imposed, upon the premises, or upon the landlord in respect thereof. The lease was determinable by six months' notice. The landlords gave notice to determine it, and contracted to sell the property. The District Board of Works gave notice to the landlords of apportionment of expenses of paving a new street, under the Metropolis Management Act, 1855, s. 77, fixing no date for payment. The landlords paid the amount claimed. The work was commenced after the notice to determine the lease had expired.

In an action by the landlords to recover under the covenant the amount paid by them to the District Board:—

Held, that the words of the covenant included the expenses of paving the new street, and that, when the District Board gave notice to the landlords of the apportionment and charge, the charge became operative, and the landlords became liable to pay the amount, and were entitled to recover it from the tenant under the covenant:

Held, also, that the landlords were owners of the premises, within the meaning of the Metropolis Management Act, 1855, s. 250, until the date fixed by the contract of sale for completion.

Thompson v. *Lapworth*, (1868) L. R. 3 C. P. 149, followed.

ACTION tried before Bruce J. without a jury.

The plaintiffs sued to recover the sum of 112*l.* 6*s.* 7*d.*, the amount which they had paid to the Wandsworth District Board of Works as their share of the estimated expenses of paving a new street. In 1882 the predecessor in title of the plaintiffs

demised certain land in Wandsworth, within the metropolis (1), for a term of twenty-one years, determinable after the expiration of the first seven years, by a six months' notice, on certain terms, without prejudice to any rights or remedies which might have accrued under the covenants.

The defendant was assignee of the lease, which contained a covenant by the lessee, for himself and his assigns, that he would "during the said term, bear, pay, and discharge, all taxes, charges, rates, duties, tithes, and tithe rent-charge, assessments, and impositions, whatever, which are now, or may, at any time hereafter be, taxed, charged, rated, assessed, or imposed, upon the said premises, or any part thereof, or upon the landlord or tenant in respect thereof, the landlord's property tax only excepted." In April, 1898, the plaintiffs gave a six months' notice to determine the lease. On May 19, 1898, the plaintiffs entered into an agreement to sell the property in question, the date fixed for completion of the purchase being August 11, 1898. On June 9, 1898, the Wandsworth District Board of Works gave to the plaintiffs a notice, of which the following are the material provisions: "Take notice that the Board of Works for the Wandsworth District have, pursuant to the provisions of the Metropolis Management Act, 1855, and of the various Acts amending the same, apportioned and charged the respective owners of the several houses forming, and of the land bounding or abutting on, a certain new street" (describing it) "with the payment of a part of the apportioned estimated costs, charges, and expenses, of paving such new street . . . . and that you are thereby apportioned and charged the sum of 112*l.* 6*s.* 7*d.* . . . . The amount may be paid . . . . any day . . . . Any objection to the apportionment above referred to must be made in writing and sent in to the Board on or before Tuesday, June 28, 1898." (2) On July 14, 1898,

(1) 18 & 19 Vict. c. 120, s. 250.

(2) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105, provision is made for paving new streets, and for charging the estimated expenses on the owners of the houses in the streets. By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77, "Where any vestry or district board shall, under the powers given by s. 105 of" 18 & 19 Vict. c. 120, "have paved or be about to pave any new street, the owners of the land

1899

WIX v. RUTSON.

the plaintiffs paid to the Board of Works the sum demanded by the above notice, and they now claimed to recover that amount from the defendant under the covenant in the lease. The work was not commenced until after the date at which the defendant's tenancy was determined by the six months' notice given in April, 1898.

Feb. 11. *Macmorran, Q.C.*, and *George Wallace*, for the plaintiffs. As soon as the notice of June 9, 1898, was given by the Wandsworth District Board of Works to the plaintiffs, the plaintiffs became liable to pay the amount claimed to the Board of Works, and that amount then became a charge, duty, assessment, or imposition, charged on the landlords in respect of the premises, which the plaintiffs were entitled to recover under the covenant in the lease: *Thompson* v. *Lapworth*. (1)

H. L. Manby, for the defendant. The notice of June 9 was not a sufficient demand to bring the case within the words of the covenant, and therefore the defendant is not liable. Sect. 96 of the Metropolis Management Amendment Act, 1862, requires a demand by the vestry or district board in order to make the owner liable. The section empowers the vestry or district

---

bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, ... And any such costs or expenses . . . . shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; . . . . and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

By s. 96, "It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under" 18 & 19 Vict. c. 120 "or this Act, either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by" 18 & 19 Vict. c. 120 "and this Act; . . . . provided that nothing herein contained shall be taken to affect any contract made, or to be made, between any owner and occupier of any house, building, or other property, whereof it is, or may be, agreed that the occupier shall pay and discharge all rates, dues, and sums of money, payable in respect of such house, building, or other property."

(1) L. R. 3 C. P. 149.

board "to require the payment," in which case the owner is to be liable. Here the notice only amounted to an assessment, which did not make the plaintiffs liable to pay, and therefore they cannot recover. The work was not even begun until after the defendant's tenancy had determined, and it would be most unreasonable that he should have to pay for works from which he never can derive any benefit.

[The following authorities were also referred to: *Allum* v. *Dickinson* (1); *Wilkinson* v. *Collyer* (2); *Batchelor* v. *Bigger* (3); *Brett* v. *Rogers* (4); *Baylis* v. *Jiggens*. (5)]

Feb. 13. The following written judgment was delivered by

BRUCE J. In this case I entertain no doubt about the construction of the covenant. I think the words clearly include charges made in respect of the paving of new streets under s. 77 of the Metropolis Management Amendment Act, 1862. The case of *Thompson* v. *Lapworth* (6) seems to me to be an authority quite in point.

But the case is one of apparent hardship, because the interest of the tenant was determinable by the landlord on giving six months' notice. Such notice was given in April, 1898, so that the interest of the tenant came to an end in the following October.

It was on June 9, 1898, that notice of apportionment was given by the local authority, charging the owners of the premises in question with 112*l*. 6*s*. 7*d*. This charge was made before the work was commenced; indeed it was stated by the defendant's counsel that the work was not commenced until the present month of February, and it was said to be very unreasonable that the tenant should be bound to pay the cost of works from which he could derive no benefit. But my duty is only to give effect to the agreement the parties themselves have entered into, and I cannot give the defendant relief merely because he has entered into a covenant which bears hardly upon him. It was contended by Mr. Manby, who

(1) (1882) 9 Q. B. D. 632.
(2) (1884) 13 Q. B. D. 1.
(3) (1889) 60 L. T. (N.S.) 416.
(4) [1897] 1 Q. B. 525.
(5) [1898] 2 Q. B. 315.
(6) L. R. 3 C. P. 149.

1899

WIX v. RUTSON.

Bruce J.

argued the case on behalf of the defendant, that the apportioned sum had not become a charge, because there was no evidence of any express demand for payment having been made upon the plaintiffs. But it seems to me that the notice of June 9 was all that was necessary to constitute the 112*l.* 6*s.* 7*d.* a charge upon the owners. By virtue of the 77th section, to which I have already referred, the owners of premises abutting on a new street are made liable to the expenses, or estimated expenses, of paving, and the section directs that the costs of paving shall be apportioned by the vestry, and shall be recoverable, either before the work shall be commenced, or during its progress, or after its completion, and such amount shall be recoverable from the owner of the premises, either by action at law, or in a summary manner before a justice of the peace.

As soon as the vestry, by a formal act or resolution, charged the owners of the houses abutting on the new street with the expenses, and apportioned and charged the particular sum of 112*l.* 6*s.* 7*d.* in respect of the premises of the plaintiffs, and gave notice to the plaintiffs of the apportionment and charge, I think that the charge became operative, and the plaintiffs became liable to pay the same. And if they paid it after they became liable to pay it, I think they are entitled to recover it from the defendant by virtue of his covenant. The plaintiffs were under no obligation to wait for any formal demand, or for any threat of proceedings. Nothing further was necessary beyond the service of the notice of June 9 to render the plaintiffs liable to pay the sum apportioned and charged.

The cases decided on the provisions of the Public Health Act seem to me to have no application to the present case, because the provisions of that Act, and the machinery provided by it, are altogether different.

I was impressed with Mr. Manby's argument that the 96th section of the Metropolis Management Amendment Act, 1862, seemed to require a demand to be made before the amount charged could be recovered. But when that section is carefully considered in connection with the repealed sections, 217, 218, and 219, of the Metropolis Management Act, 1855, I think it is clear that the object of the section is merely to give to the

local authority a discretion to require payment of any costs or expenses which the owner may be liable to pay, either from the owner or from the occupier, subject to certain provisions which are inserted for the protection of the occupier. It does not impose any new demand as a condition of the owner's liability.

The plaintiffs in my opinion were liable to pay immediately after the service of the notice of June 9, 1898; they did pay the amount on July 14, 1898, and I cannot find any valid reason for exempting the defendant from the burden of the covenant his assignor has entered into.

There is one other point I should mention. On May 19 the plaintiffs agreed with certain persons to sell to them the property in question. The day fixed for completion of the purchase was August 11, and until that date the plaintiffs were, by the terms of the agreement, to be entitled to the rents, and were to bear all outgoings. I think it is quite clear that until August 11 the plaintiffs were owners, within the meaning of the interpretation clause, s. 250 of the Act of 1855.

In the result I must give judgment for the plaintiffs for 112*l.* 6*s.* 7*d.*, with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Park, Nelson & Co., for Wade, Wix & Wade, Great Dunmow.*

Solicitor for defendant: *J. P. Murrough.*

P. B. H.

1899
Jan. 31.

MOXHAM *v.* GRANT.

Company—Money Paid Ultra Vires by Directors to Shareholders—Order on Directors to Replace it—Right of Directors to Indemnity from Shareholders.

Directors of a company, which had not obtained the sanction of the Court to a reduction of its capital, distributed a portion of the capital amongst the shareholders with their assent, and with notice of the fact that the money so distributed was part of the capital. The company was subsequently wound up, and the liquidator obtained an order that the directors should replace the money on the ground that the payment to the shareholders was ultra vires:—

Held, that the directors were entitled to an indemnity from the shareholders.

Appeal from the county court of Glamorganshire holden at Swansea.

Cory's Steamers, Limited, was a company established for the object of owning shares in ships, and the whole of its capital was invested in shares in ships. Amongst the ships in which the company held shares was one called the *Primrose*, its shares in which were insured. In February, 1894, the *Primrose* was lost, and the company received from the underwriters sums amounting to 1001*l.* 9*s.* 6*d.* The directors of the company, finding that freights were so low as to render investments in steamers unremunerative, sent round a circular to their shareholders proposing to distribute the greater part of the insurance money received by the company amongst the shareholders in proportion to the number of their respective shares, thereby effecting a reduction of the capital assets of the company. The shareholders, including the defendant, unanimously agreed to that proposal, and the money, amounting to 719*l.* 2*s.* 6*d.*, was distributed accordingly, the defendant receiving as his share 35*l.* 15*s.* At that time the company had no creditors. Subsequently the company was ordered to be wound up, and the liquidator obtained an order in the Swansea County Court under s. 10 of the Companies (Winding-up) Act, 1890, declaring that the 719*l.* 2*s.* 6*d.* distributed by the directors was unlawfully paid by them to themselves and the other shareholders in reduction of the capital of the company, and ordering

the directors to pay to the liquidator the sum of 719*l.* 2*s.* 6*d.* without prejudice to the right of the directors to be recouped by the shareholders the amounts paid by the directors to them. The directors then sued the defendant in the county court to recover the 35*l.* 15*s.* paid by them to him. The county court judge gave judgment for the plaintiffs.

The defendant appealed.

Witt, Q.C., and *Poley*, for the defendant. Directors who pay away ultra vires money of the company to the shareholders and are ordered to replace it cannot recover it back from the shareholders; for their act in paying it away was an illegal act in respect of which they and the shareholders were joint wrongdoers, and between wrongdoers there is no contribution. If a trustee has improperly parted with money to third persons the cestui que trust may follow the money in the hands of the third persons, and possibly the trustee may recover it from the third persons for the benefit of the cestui que trust; but there is no authority to shew that after he has been compelled by the cestui que trust to replace it he can sue the third parties for the purpose of putting the money in his own pocket. At any rate, the payment was not made under any mistake of fact. A mistake of law is not enough to entitle the directors to recover the money back. In this respect equity follows the law: *Rogers* v. *Ingham*. (1)

Meager, for the plaintiffs. Although there is no express decision that under such circumstances as the present the money is recoverable back by the directors, it has been suggested in more than one case that it is so. The form of order in this case follows that made in *In re National Funds Assurance Co.* (2), where Jessel M.R. ordered directors who had paid dividends out of capital to replace the money "without prejudice to (their) right to call upon this Court to enforce against the shareholders who did receive the sum of money repayment by summons or otherwise." And in *In re Alexandra Palace Co.* (3) Fry J. made a similar order. The contention that the

(1) (1876) 3 Ch. D. 351. (2) (1878) 10 Ch. D. 118.
(3) (1882) 21 Ch. D. 149.

1899

MOXHAM v. GRANT.

plaintiffs and the defendant are joint tortfeasors is ill-founded. An ultra vires payment of dividends out of capital is no doubt illegal and a breach of trust, but it has not that character of moral wrongfulness which is necessary to prevent the implication of a contract to indemnify. Bacon V.-C. in *Flitcroft's Case* (1), speaking of such a payment, said, "It is no tort whatever; it cannot be called a tort." If, then, the company were not in liquidation, the plaintiffs would clearly have a right to be indemnified by the shareholders: *Sawyer* v. *Sawyer* (2); *Trafford* v. *Boehm*. (3) And it can make no difference that by reason of the liquidation the plaintiffs have ceased to be trustees, for an indemnity is a personal right. The doctrine that money paid under a mistake of law cannot be recovered back has no application except where the relation of debtor and creditor exists between the parties, which is not the case here. This is money which the defendant might have been compelled to pay to the liquidator: *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Co.* (4) But where one person is legally compelled to pay money which another person is legally compellable to pay, the law implies a contract of indemnity.

Witt, Q.C., in reply. Assuming that the directors could have recovered the money before the liquidation began for the benefit of the company, their right to sue ceased as soon as they ceased to be directors. They are now endeavouring to recover the money in their individual capacity. Suppose the defendant had paid the money to the plaintiffs, and the plaintiffs had never accounted to the liquidator, upon an action being brought by the liquidator against the defendant he could not plead payment. The case of *Trafford* v. *Boehm* (3) is not in point. All that that case decides is that a trustee who commits a breach of trust with the approbation of the cestui que trust may require any loss to be made good out of the estate of the cestui que trust; but it does not decide that he has a corresponding remedy against a stranger. The cestui que trust of the directors is the company; the individual shareholders are strangers to the trust. In Lindley on Companies,

(1) (1882) 21 Ch. D. 519, at p. 527.
(2) (1885) 28 Ch. D. 595.
(3) (1746) 3 Atk. 440, 444.
(4) (1875) 1 Ch. D. 682.

5th ed. p. 389, it is said that directors who in such a case as the present act ultra vires through a mistake of law, but with full knowledge of the facts, would not be entitled to relief against the shareholders.

LAWRANCE J. In this case I think that the county court judge was right. The facts are these. The company carried on the business of owning shares in ships, and one of the ships in which it owned shares was lost. The shares were insured, and the insurance money was received by the directors from the underwriters. The directors, instead of reinvesting the money in similar shares, sent round a circular to the shareholders proposing that the money should be divided amongst them. To that proposal the shareholders all agreed, and the money was accordingly divided amongst them in proportion to the number of their shares. Later on the company was ordered to be wound up, and in the course of the winding-up the liquidator discovered the fact of the division of the money among the shareholders, and he obtained an order that the directors should refund it, without prejudice to their right of recourse against the shareholders. Then the present action is brought to recover from the defendant, who is one of the shareholders, his proportion of the money. It seems to me that there is no valid answer to the claim. The shareholders knew at the time perfectly well that it was insurance money that they were receiving; and under those circumstances it is not just that the directors, as between themselves and the shareholders, should be held personally liable for the payment in which the shareholders acquiesced and from which they alone benefited.

CHANNELL J. I am of the same opinion. As regards the merits the case is free from difficulty, for it is perfectly clear that the shareholders who actually got the money into their pockets ought to be the persons to refund it, rather than the directors who by a mistake of law were instrumental in paying away to the shareholders money which in fact formed part of the capital of the company. It is not a case in which there was any real fault on the part of the directors. It was an error of judgment—a mistake of company law. If they had first

1899

MOXHAM v. GRANT.

Channell J.

taken certain proceedings in the Chancery Division and got an order for the reduction of the company's capital, the payment of the money would have been perfectly regular.

But as regards the legal aspect of the case, I cannot say that it is altogether free from difficulty. The objection raised by the defendant is that it is a case to which the rule ought to be applied that there is no contribution or indemnity between joint tortfeasors. But in my opinion it is not a case to which that rule ought to be applied, for what was done here did not amount to a joint tort so as to make that rule apply. At first I had some doubt as to what was the position of a trustee who under an innocent misconstruction of his trust deed paid part of the trust money to the tenant for life, when he ought to have kept it as capital for the benefit of those entitled in remainder. But when one looks at the authorities it seems clear that the trustee and cestui que trust in such a case are not regarded as in pari delicto. In *Trafford* v. *Boehm* (1), the earliest case that is usually cited on the point, Lord Hardwicke laid it down that "The rule of the Court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the cestui que trust, it must be made good first out of the estate of the person who consented to it." In *Raby* v. *Ridehalgh* (2) trustees had at the instance of the tenants for life invested in a security not authorized by the trust, but producing a higher rate of income than that produced by the authorized securities. Upon the security proving insufficient the trustees were decreed to make good the loss, and it was held that the tenants for life and their interests in the trust funds were liable to recoup the trustees to the extent to which their estates had benefited by the improper investment. There is a passage in the judgment of Turner L.J. which, assuming that shareholders of a company stand to the directors in the relation of cestui que trustent, exactly applies to the present case. "It is," he says (3), "trust money received by them under a breach of trust to which they were privy, and the effect, I apprehend, must be that, as the loss

(1) 3 Atk. 440, 444. (2) (1855) 7 D. M. & G. 104.
(3) 7 D. M. & G. at p. 109.

which ought to fall on those who instigated the breach of trust has been laid by the Court upon the trustees, the trustees are entitled to stand in the place of the cestui que trustent in remainder, for the purpose of recovering against the cestui que trustent for life who instigated the breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust." And in *Sawyer* v. *Sawyer* (1) Chitty J. (2) refers to what he calls "the well-known case of *Raby* v. *Ridehalgh*," which he says "proceeds upon the footing that each person at whose instance the trustees have committed a breach of trust is liable to recoup the subject of that breach of trust to the trustees." It seems to me then that, if it can be said that these shareholders who received this money instigated the breach of trust, the directors are entitled to stand in the place of the liquidator for the purpose of recovering the money back from the shareholders. And when one considers that such judges as Jessel M.R. and Fry L.J., when making orders against directors to replace money of the company improperly paid to the shareholders, pointedly made those orders without prejudice to their right to recover over, it is difficult to suppose that that right does not exist. The doctrine that they are entitled to stand in the place of the persons who might directly have recovered the money from the shareholders gets rid of the difficulty which might otherwise exist as to whether the directors were entitled to recover after the commencement of the winding-up, and consequently after they had ceased to be trustees. On the whole, then, I think that there is no principle of law which prevents our giving effect to what are undoubtedly the merits of the case—that it is the shareholders, who have received the money and put it in their pockets, who ought to replace it, and not the directors, who merely misconstrued their authority to pay it away.

Appeal dismissed.

Solicitor for plaintiffs: *J. R. Richards, Swansea.*
Solicitor for defendant: *F. Du Bois.*

(1) 28 Ch. D. 595. (2) 28 Ch. D. at p. 598.

J. F. C.

1899
Feb. 2.

LYNES *v.* SNAITH.

Statutes of Limitations—Tenant at Will—Doing of Repairs by Landlord—Determination of Will.

Where a person is in possession of premises as tenant at will without payment of rent, the fact that the landlord enters the premises without objection on the part of the tenant for the purpose of doing repairs does not amount to a determination of the will so as to interrupt the acquisition by the tenant of a title under the Statutes of Limitations.

APPEAL from county court of Leicester.

John Snaith was the owner of eleven cottages in Walnut Street, Leicester, and in April, 1884, he gave permission by parol to the defendant, his daughter-in-law, to live in one of them, No. 27, Walnut Street, rent free. She accordingly entered into possession, and continued in possession of the cottage from that time down to action brought. In July, 1897, John Snaith died, having devised the cottage in question to trustees in trust for the plaintiff for life with remainders over. In September, 1897, the trustees applied to the defendant for rent, which she refused to pay on the ground that she had acquired a statutory title to the premises. In 1898 the plaintiff brought ejectment. It appeared that John Snaith had from time to time during the period that the defendant was in occupation sent workmen on to the premises to repair the cottage, No. 27, in the same way that he repaired his other cottages which were let to tenants at a rent. There was no evidence that before so sending the workmen on to No. 27 he ever asked the consent of the defendant, but neither was there any evidence that it was against her consent. On one occasion she requested one of his workmen to do certain repairs to an oven. He asked his master whether he was to do them, and his master told him not, saying that as she lived rent free she might do them herself. The repairs were beneficial to her. John Snaith down to the date of his death paid the water rate, insurance, and property tax in respect of No. 27 in the same way that he did in respect of his other ten cottages. The defendant during

the whole of her occupation was rated to and paid the poor-rate. She never paid any rent, nor did she ever make any acknowledgment in writing of her father-in-law's title. The defendant further contended that the plaintiff was the wrong person to sue, and that the action ought to have been in the name of the trustees in whom the legal estate was vested. The county court judge held (1.) that the position of the defendant was that of a licensee and not of a tenant, and he relied on the case of *Peakin* v. *Peakin* (1); and (2.) that, assuming the defendant was a tenant at will, the will was from time to time determined by the landlord's entry for the purpose of doing the repairs. He accordingly gave judgment for the plaintiff. After judgment given, but before it was entered up, he added the names of the trustees as plaintiffs. The defendant appealed.

Montague Lush, for the defendant. In admissions made in the course of the action by the plaintiff it was admitted that the defendant was in exclusive possession—therefore she was not a mere licensee. Her position was that of a tenant at will. And the cases shew that in order to dispossess a tenant at will the landlord must enter against the consent of the tenant in such a way that, but for the determination of the will, he would be liable to an action of trespass: *Doe* d. *Bennett* v. *Turner*. (2) To determine the tenancy the landlord must enter and resume possession in the assertion of a right. But here the act of the landlord was not done in the assertion of a right inconsistent with the continuance of the tenancy. The repairs were beneficial to the tenant, and therefore presumably with her consent. The onus lies on the plaintiff to shew that they were done against the tenant's consent. The judge below relied on the Irish case of *Peakin* v. *Peakin*. (1) But there the case found that the owner of the house paid the occupier's taxes, which shewed that he was in possession, and not the person whom he allowed to reside in it.

[CHANNELL J. referred to *Moore* v. *Doherty*. (3)]

(1) (1895) 2 I. R. 359. (2) (1840) 7 M. & W. 226; (1842) 9 M. & W. 643.
(3) (1843) 5 Ir. L. R. 449.

1899

LYNES v. SNAITH.

There the person in occupation of the premises had duties to perform, and he was consequently in occupation only as a servant. Here the defendant was not a servant. Her occupation was not conditioned with the performance of any services. The amendment made by the judge was without jurisdiction; there is no power to add a party after final judgment.

Corner, for the plaintiff. The question of the character of the defendant's occupation is one of fact, and the finding of the judge that she occupied only as a licensee or guest is conclusive. But, assuming that she was a tenant at will, the will was determined each time that the landlord repaired. If he repaired as owner, that is enough to exclude the statutes. He treated the house as his own and repaired at such times as he chose, just as he did in the case of the other cottages.

A party may be added as plaintiff at any stage of the proceedings, even after final judgment, so long as anything remains to be done in the case: per Fry L.J., *The Duke of Buccleuch* (1); and here judgment remained to be entered.

Lush, in reply.

LAWRANCE J. The questions in this case are—first, whether the defendant was a tenant at will; and, secondly, assuming that she was, whether she was in possession of the premises for a sufficient length of time to confer on her a statutory title without the will having been determined. The facts are shortly these: she was allowed by her father-in-law to take possession of the cottage and to live there rent free for a period of upwards of thirteen years, during which the landlord from time to time entered and repaired the house in the same way that he did his other cottages in the street. As to the first question, I think it is clear that she was a tenant at will and not a licensee; for the admissions state that she was in exclusive possession—a fact which is wholly inconsistent with her having been a mere licensee. As to the other, I do not think that the entry of the landlord for the purpose of doing repairs operated as a determination of the will; for there is no evidence that the repairs were done against her consent in such

(1) [1892] P. 201, at p. 212.

a way as that the act of repairing would have constituted him a trespasser.

CHANNELL J. I also think that judgment ought to have been entered for the defendant on the merits. And in that view it becomes unnecessary to consider the second question, though my impression is that there was power to make the amendment and add the proper plaintiffs.

As to the merits, I think it is clear that the possession here was that of the occupier and not of the owner. No doubt, under the old law in force before 1833, that possession being permissive would have been treated as non-adverse, and the defendant would have acquired no title against the owner. But when the statute of William IV. did away with the old doctrine of adverse possession, a provision was inserted in that statute that in the case of a tenancy at will the statute should begin to run, notwithstanding the permissive character of the occupation, at the expiration of one year next after the commencement of the tenancy. Here I think the defendant was a tenant at will, her possession was exclusive, and the landlord, by saying that she lived in the house rent free, shewed that he intended to regard her occupation as that of a tenant. The statute, then, began to run in the defendant's favour in April, 1885, and as in ejectment the burden of proof is on the plaintiff, it is for the plaintiff to give evidence of the testator having been in possession within twelve years after that date. Is, then, the fact of his having entered from time to time to do repairs evidence of resumption of possession? I think not, unless it were shewn that those repairs were done against the defendant's will. Primâ facie she must have consented, for it was to her advantage that the repairs should be done. In *Doe* d. *Bennett* v. *Turner* (1) there was actual objection on the part of the tenant to the doing by the owner of the act which was said to have determined the will. I do not think the case of *Peakin* v. *Peakin* (2) is in point. There all the evidence went to negative the possession of the defendant. This very question as to the effect of entry by a landlord to do repairs on premises

(1) 7 M. & W. 226; 9 M. & W. 643.

(2) 2 I. R. 359.

1899

LYNES v. SNAITH.

Channell J.

in the occupation of a tenant at will was decided by Kennedy J. about a year ago in an unreported case. There a gamekeeper was assigned a cottage to reside in by his employer, and on his death his widow was allowed to continue residing there rent free, and without having any services to perform. The landlord occasionally did repairs. It was held that his entry for that purpose did not interrupt the running of the statute. The appeal must be allowed.

Appeal allowed.

Solicitor for plaintiff: *Warwick Webb, for H. Bray, Leicester.*

Solicitors for defendant: *Metcalfe & Sharpe, for Stratton & Aysom, Leicester.*

J. F. C.

1899

Feb. 4.

[CROWN CASE RESERVED.]

THE QUEEN *v.* SAUNDERS.

Criminal Law—Misreception of Evidence—Prisoners jointly Indicted—Case stated on behalf of one Prisoner only—Crown Cases Act, 1848 (11 & 12 *Vict. c.* 78), *s.* 2.

Where two prisoners jointly indicted have been convicted, and a question has been reserved for the consideration of the Court for Crown Cases Reserved on behalf of one of them, that Court has power, under 11 & 12 Vict. c. 78, s. 2, if it shall be of opinion that the objection raised is valid and that it affects the conviction of both prisoners, to quash the conviction of the other prisoner as well as that of the prisoner on whose behalf the question has been reserved.

CASE stated by the chairman of the Huntingdon Quarter Sessions for the opinion of the Court for the Consideration of Crown Cases Reserved.

At the Michaelmas quarter sessions of the peace holden at Huntingdon on October 18, 1898, Frederick Ward, James Saunders, and John C. Saunders were indicted for conspiracy. Frederick Ward pleaded guilty and James Saunders and John C. Saunders pleaded not guilty to the indictment. In the course of the trial, at which John C. Saunders was defended by counsel and James Saunders conducted his own defence, counsel for the prosecution asked the prosecutor, "Did you

make inquiries as to whether any trade had been done by the prisoners?" To this the prosecutor—the deputy chief constable—answered, "I did." Counsel for the prosecution then asked, "Did you as the result of such inquiries find that any had been done?" The prosecutor answered, "I did not." Counsel for J. C. Saunders objected to both these questions, but the chairman overruled the objections, and both prisoners were convicted and sentenced. The chairman, however, reserved for the opinion of the Court, at the request of counsel for John C. Saunders, the following question: "Were the replies to the questions above set out admissible in evidence, and, if not, could John C. Saunders be properly convicted on the indictment?"

E. E. Wild, for John C. Saunders.
H. St. John Raikes, for the prosecution.

THE COURT (Lord Russell of Killowen C.J., Wills, Lawrance, Bruce, and Kennedy JJ.) held that the evidence was inadmissible as being hearsay, and that, therefore, the conviction of John C. Saunders was bad, since evidence not legally admissible against him had been left to the jury. (1)

The question then arose as to the mode in which the Court could deal with the conviction of James Saunders, against whom the same evidence which the Court had held to be inadmissible had been left to the jury, but on whose behalf the point had not been taken.

LORD RUSSELL of KILLOWEN C.J. The Court is of opinion that it has power to deal with both convictions. It is true that the point was taken on behalf of John C. Saunders only, he alone being represented by counsel at the trial, and that the case is only stated in regard to him. But we think that under the circumstances we have power to deal with the conviction of James Saunders also.

No doubt, by s. 2 of 11 & 12 Vict. c. 78, the Court for the Consideration of Crown Cases Reserved is limited to hearing

(1) See *Reg.* v. *Gibson*, (1887) 18 Q. B. D. 537.

1899

REG. v. SAUNDERS.

Lord Russell C.J.

and determining the questions of law reserved by the case, and that it cannot go outside them; but, having determined those questions, power is given to the Court by the section "thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen or to avoid such judgment."

The question of the admissibility of this particular piece of evidence is, as is apparent from the case, absolutely identical as regards John C. Saunders and James Saunders, and it is plain that if, as we have held, the admission of that particular item of evidence renders the conviction of John C. Saunders bad, it must have a similar effect on the conviction of James Saunders. The only question, therefore, is: how to give effect, in the case of James Saunders, to our decision. We might send the case back in order that it should be restated on behalf of James Saunders; but that course would involve unnecessary delay, since the case could not be restated at any rate until the next meeting of the quarter sessions. Another course would be for this Court to communicate the result of its decision to the Home Secretary; but that is open to the objection that he would have no power to quash the conviction of James Saunders, and could only remit the punishment. That in certain cases might involve a good deal of hardship, and seems undesirable. There might well be cases where prisoners have been indicted together, and where the quashing of the conviction of one on a point taken on his behalf might not affect the conviction of the others. In such a case, of course, the Court would not interfere; but where, as here, it is clear that the convictions of the two prisoners stand or fall together, it seems to us right, as we think that we have power to do so, to order that both convictions should be quashed.

Convictions quashed.

Solicitor for prosecution: *Solicitor to the Treasury.*

Solicitors for prisoner: *Sole, Turner & Knight, for Papworth & French, Cambridge.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1899
Feb. 4.

PRICE *v.* J. MARSDEN & SONS.

Employer and Workman—Accident to Workman—Compensation—Average Weekly Earnings—Alteration of Character of Employment and Rate of Pay—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I.*, 1 (*b*).

A workman was employed for a period of twelve months by the same employer. During that period the character of his employment was altered and the amount of his wages increased. At the end of the twelve months he met with an accident which partially incapacitated him:—

Held, that the change in the character of the employment did not affect the compensation to which he was entitled under the first schedule to the Workmen's Compensation Act, 1897, which should be arrived at from his average weekly earnings during the whole of the previous twelve months.

APPEAL from the decision of the county court of Lancashire holden at Bolton on a question of law arising on a claim for compensation under the Workmen's Compensation Act, 1897.

The appellant Smith was a workman in the employment of the respondents J. Marsden & Sons, and he had been so for twelve months prior to the accident out of which the claim arose. For the first forty-nine weeks of the twelve months he had been employed as a "little piecer," and his wages had been 9*s.* 6*d.* a week, and for the last three weeks he had been employed as a "side piecer," and his wages had been 13*s.* 8*d.* a week. To arrive at the amount of compensation to be awarded the county court judge took forty-nine weeks at 9*s.* 6*d.* a week and three weeks at 13*s.* 8*d.* a week, added together the amounts so arrived at, and divided the total by fifty-two. The sum so arrived at he treated as the "average weekly earnings during the previous twelve months" mentioned in the first schedule, 1 (*b*), to the Workmen's Compensation Act, 1897 (1), and he awarded a weekly payment of half the amount.

The workman appealed.

(1) 60 & 61 Vict. c. 37, Sched. I., 1: "The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings

C. A. 1899

PRICE v J. MARSDEN & SONS.

Clarke Hall, for the appellant. The amount awarded has been arrived at on a wrong basis. At the time of the accident the workman was earning 13*s.* 8*d.* per week, and that amount should have been taken as his average weekly earnings. The qualification as to twelve months' employment is "if he has been so long employed," and that must mean employed in the same employment—that is, in the same work. The consequences of adopting the system under which the county court judge assessed compensation are so anomalous that his method cannot be right. For instance, an apprentice earning nothing is promoted to work at 1*l.* a week, and at the end of the first week he meets with an accident. His average weekly earnings if the whole year is taken would be less than 5*d.*, and his compensation, although at the time of the accident he was receiving 1*l.* a week, could not exceed 2½*d.* a week. Suppose, however, that the apprentice gets employment elsewhere and the same thing happens, he might get 10*s.* a week. So if a man went at a late period of the twelve months to a class of work less highly paid than that which he had during the greater part of the year, his compensation might be larger than, or nearly as large as, the wages he was receiving at the time of the accident. Sect. 3 of the Employers' Liability Act, 1880, limits the sum recoverable as compensation under the Act to the equivalent of the estimated earnings during the three years preceding the inquiry of a person "in the same grade employed during those years in the like employment." Similarly the employment indicated in the schedule to the Workmen's Compensation Act, 1897, is a continuous employment in one class of work, and, if so, the first part of clause 1 (*b*) relating to twelve months does not apply, and the period over which the average weekly wages of the workman should have been calculated is the three weeks passed in his new employment.

Loehnis, for the employers, was not called on.

---

during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

A. L. SMITH L.J. The question before us is whether the words in the schedule to the Act, "average weekly earnings during the previous twelve months, if he has been so long employed," refer to employment by the same employer or to employment of the same kind throughout the year. The county court judge has taken the first of these views, and has added up all the earnings of the workman for the previous twelve months, and divided by fifty-two to get at the average weekly earnings. For the workman it is said that the second view should be adopted, and that the period from which the average weekly earnings are to be calculated is the time in which the workman has been employed in the same kind of employment. I cannot agree with this view. In cases where death results from the injury, we find in clause 1 (*a*) of the schedule that the compensation to be paid to his dependents is a sum equal to his earnings "in the employment of the same employer" during the three years preceding the injury, and lower down in the same clause is the expression "during the period of his actual employment under the same employer." Then in clause 1 (*b*), in cases where the workman has not been employed twelve months, we also find the expression "in the employment of the same employer." It seems to me to be quite clear from the words themselves and from the context that "if he has been so long employed" mean if he has been so long employed by the same employer.

I think the county court judge was right in his method of computation, and that the appeal should be dismissed.

CHITTY and COLLINS L.JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Chester & Co., for Fielding & Fernihough, Bolton.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for Hall & Son, Bolton.*

A. M.

1899
Feb. 15.

LONDON COUNTY COUNCIL *v.* DIXON.

London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), s. 8—*New Street—Commencing to Form Street.*

A row of houses having been erected along the side of a street forming part of a building estate, the respondent erected a shop on land purchased from the freeholder of the estate on the same side of the street and fronting to it, but separated from the end house of the row by an intervening vacant space of the width of forty feet, which is the statutory width of a street intended for carriage traffic. There was a side door leading from the shop into the vacant space. At the back of the shop he also erected a stable, the only access to which for carriages and horses was along the vacant space. This space, which was the property of the freeholder of the estate, was marked on the estate plan as a proposed street, but at the time of the erection of the shop and stable it had not been in fact laid out by the freeholder as a street; and, although the respondent expected that it would be laid out as a street, there was no contract by the freeholder that it should be so laid out:—

Held, that, as the respondent had no control over the soil of the vacant space, he did not by erecting the shop and stable commence to form a street within the meaning of s. 8 of the London Building Act, 1894.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellants against the respondent, charging that in May, 1898, at Sandhurst Road, in the parish of Lewisham, he did commence to form a street for carriage traffic leading out of Sandhurst Road without having obtained the sanction of the appellants, contrary to the provisions of the London Building Act, 1894.

At the hearing of the information the following facts were proved or admitted:—

Sandhurst Road is a new street laid out upon the estate of Mr. Cameron Corbett, and was sanctioned by the appellants in March, 1896.

In May, 1898, a continuous row of houses had been erected on the south side of Sandhurst Road, the house at the western end of the row being No. 14, and in that month the respondent commenced to erect a shop on the same side of Sandhurst Road at a distance of forty feet from No. 14 and fronting into Sandhurst Road. The space so left between the respondent's

shop and No. 14 was the alleged street which the respondent was charged with having commenced to form.

The respondent's shop had windows looking into the alleged street, and there was also a door opening out of the shop into it at a distance of ten or twelve feet from Sandhurst Road, and at the back of the shop a coach-house and stable had been erected by the respondent, the only access to which for horses and carriages was by an entrance eighty feet down the alleged street.

The alleged street, which is about ninety feet in length, is the property of Mr. Cameron Corbett. There was no evidence that he had entered into any formal agreement with the respondent that the space forming the alleged street should be left open, but it was marked on his estate plan as a proposed new street.

Nothing had been done by the respondent to form or lay out the alleged street except the building of the shop and the stable in the manner aforesaid.

On behalf of the appellants it was contended that the respondent, by building the shop with windows looking into the vacant space and with a door opening into it, and by erecting the stable, access to which for carriages and horses could only be had by way of such space, did in fact commence to form a street.

For the respondent it was contended that if such space was a street, the respondent did not form it, not being the owner of the space and not having the power to control the manner of its disposal.

The magistrate found as a fact that under the circumstances a new street for carriage traffic had been commenced to be formed and laid out, but that, though the respondent erected the shop and stable in the expectation that the space would be a street, he did not commence to form it on the ground that he had no control of the roadway of the alleged street; and he accordingly dismissed the information subject to a case for the opinion of the Court.

Avory (*Daldy* with him), for the appellants. Sect. 7 of the

1899

LONDON COUNTY COUNCIL v. DIXON.

London Building Act, 1894, provides that no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the council. And by sect. 8 (1) a person is to be deemed to commence to form a street if he begins to build a house in such a position that it may become one of three or more houses abutting on land on which a street is intended to be or may be thereafter laid out or formed. The question is whether it is necessary, in order to bring a builder within the provisions of those sections, that he should be the owner of the soil of the street. The magistrate found as a fact that the street had been commenced to be formed; but if so, it must have been by the respondent, for the freeholder had done nothing.

R. Cunningham Glen, for the respondent. The respondent had no power to lay out this street, and the freeholder had not laid it out. The finding of the magistrate that a street had been commenced to be laid out must be rejected, as there was no evidence to support such a finding: *Gozzett* v. *Malden Urban Sanitary Authority*. (2) A street must be laid out either previously to or contemporaneously with its formation; it cannot be formed before it is laid out. The fact that the space is marked as an intended street on the estate plan does not bind the freeholder to use it as a street; it does not create any contract between him and the respondent to do so. Even if the facts of this case come within the enacting part of s. 8, they also fall within the proviso. The respondent, when building the shop, hoped to get a public right of access to the stable, but he knew he might never get it. Therefore he built

(1) By s. 8 of the London Building Act, 1894, "For the purposes of this part of this Act a person shall be deemed to commence to form or lay out a street if he erect a fence or other boundary, or lay down lines of kerbing, or level the surface of the ground so as to define the course or direction of a street, or if he form the foundations of a house in such manner and in such position as that such house will or may become one of three or more houses abutting on or erected beside land on which a street is intended to be or may be thereafter laid out or formed: Provided that no person shall be deemed to commence to form or lay out a street if he do any of the acts in this section mentioned for some purpose other than that of forming or laying out a street."

(2) [1894] 1 Q. B. 327.

for a purpose other than that of forming a street within the meaning of that proviso.

Avory, in reply. There is nothing in the Act to shew that a street cannot be formed before it is laid out. The two words refer to different subjects-matter: forming refers to the houses at the side, laying out to the roadway.

LAWRANCE J. I have come to the conclusion that the magistrate was right. By his finding that, though the respondent had erected the house in the expectation that the space would be a new street, yet he did not commence to form it on the ground that he had no control of the roadway, I think he meant that in his opinion the case fell within the proviso to s. 8, which is in these terms: "Provided that no person shall be deemed to commence to form or lay out a street if he do any of the acts in this section mentioned for some purpose other than that of forming or laying out a street." The respondent did not erect the house for the purpose of forming the street, for he had no power to do anything of the kind. It was a matter of comparative indifference to him whether the space became a public street or not provided he had got a right of way to the back part of his premises, and such a right I infer, from the fact of the space having been marked upon the estate plan as a proposed street, that he had got by arrangement with the freeholder.

CHANNELL J. I am of the same opinion. Sect. 8 is a very difficult one to understand. The enacting part seems to involve an absurdity, for it enacts that "a person shall be deemed to commence to form . . . . a street . . . . if he form the foundations of a house in such manner and in such position as that such house . . . . may become one of three . . . . houses abutting on . . . . land on which a street . . . . may be thereafter laid out." Every house *may* become one of three houses, for someone else may come and build the other two; and the land on which it abuts *may* thereafter have a street laid out on it; therefore, so far as the enacting part is concerned, every one who builds a house, no matter where he builds it, is

1899

LONDON COUNTY COUNCIL v. DIXON.

Channell J.

commencing to form a street. But that primâ facie absurdity is corrected by the proviso, which says that the mere building of a house shall not be deemed to be the commencement of the formation of a street if done "for some purpose other than that of forming" a street. But then what is the construction to be put upon that language of the proviso? I think it is a legitimate construction to say that a man does the acts in the section mentioned "for some purpose other than that of forming" a street if he does them for what I may term a neutral purpose, as, for instance, where a man so builds a house that, in the event of the land adjacent to it being thereafter laid out as a street, it may be available for the purpose of having access to and forming part of the street, but that also, in the event of the adjacent land never being laid out as a street, it may equally be capable of being used and enjoyed as a house in the shape in which he builds it. Then, if that is the true meaning of the proviso, the facts found by the magistrate seem to me to bring the case within it. For what I think the magistrate means by saying that the space was marked as a proposed street on the estate plan is that the respondent had purchased the site of his house on the terms that the freeholder should give him some kind of right of way or access to the back of the premises. The respondent had no power to turn the space into a street himself, but, knowing that it was likely to become a street, he so built his house as to be suitable in the event of a street being laid out. That seems to me to be a neutral purpose and one that is "other than that of forming" a street within the meaning of the proviso. The appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *Blaxland.*

Solicitors for respondent: *E. Shalless.*

J. F. C.

WOHLGEMUTHE *v.* COSTE.

1899
Feb. 9, 10.

County Court—Appeal—Question of Law raised at Trial—Request to make a Note—Condition Precedent to Appeal—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*Rules of the Supreme Court*, 1883, *Order* LIX., *r.* 8.

It is a condition precedent to the right of appeal to the High Court from the judgment of a county court judge, under the County Courts Act, 1888, s. 120, that the question of law relied on in support of the appeal shall be raised at the trial, but a request to the judge to make a note is not a condition precedent, and therefore if the notes of the judge are not produced, the Court has jurisdiction, under the Rules of the Supreme Court, 1883, Order LIX., r. 8, if satisfied that the question of law was raised at the trial, to hear the appeal upon other evidence, though a request to make a note has not been made.

APPEAL by the defendant from the county court of Kent holden at Gravesend.

The action was brought to recover a sum of money alleged to be due from the defendant to the plaintiff for commission in respect of the sale of a public-house. At the trial, before the county court judge without a jury, judgment was given for the plaintiff. The solicitor for the defendant gave notice of appeal, and applied to the registrar of the county court for a copy of the judge's notes, which was not furnished, the ground stated for not furnishing it being, that the counsel for the defendant did not ask the county court judge to make a note in accordance with the Act. (1) From the shorthand note which was

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120, "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner, and subject to such conditions, as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court. . . . . At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence

1899

WOHLGEMUTHE v. COSTE.

used on the hearing of the appeal, it did not appear that any direct request to make a note had been made to the county court judge at the trial, but it did appear that, after the evidence on behalf of the plaintiff had been given, counsel for the defendant had taken the point that there was no evidence that the plaintiff had introduced the purchaser of the public-house to the defendant. When the case came before the Divisional Court, it was objected on behalf of the plaintiff that the requirements of the County Courts Act, 1888, had not been complied with, and therefore the Court had no jurisdiction to hear the appeal.

Minton Senhouse, for the defendant, in opposition to the objection. Under s. 120 of the County Courts Act, 1888, it is not a condition precedent to the right of appeal that the county court judge should be asked in so many words to make a note. The only condition precedent to the right of appeal is, that the point of law relied on should be raised at the hearing in the

---

in relation thereto, and of his decision thereon, and of his decision of the action or matter."

By s. 121, "In any action or matter in which there is a right of appeal, and the judge has at the request of either party made a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter, he shall, at the expense of any person or persons being party or parties in any such action or matter, furnish a copy of the note so taken at the said trial or hearing, or allow a copy to be taken of the same, by or on behalf of such person or persons, and he shall sign such copy, whether a notice of motion in the matter of the said appeal has been served or not, and the copy so signed shall be used and received at the hearing of such appeal."

Sect. 122 regulates the jurisdiction of the High Court on the hearing of the appeal.

By s. 124, "No judgment or order of any judge, nor any action or matter brought before him or pending in his court, shall be removed by appeal, motion, certiorari, or otherwise, into any other court whatever, save and except in the manner and according to the provisions in this Act mentioned."

By Order LIX., r. 8, of the Rules of the Supreme Court, 1883, "On any motion by way of appeal from an inferior court, the court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior court are not produced, to hear and determine such appeal upon any other evidence, or statement of what occurred before such judge, which the Court may deem sufficient."

county court. If that is done the terms of the Act are satisfied, and the appeal ought to be heard: *Morgan* v. *Davies* (1); *Seymour* v. *Coulson*. (2) No doubt *Cook* v. *Gordon* (3) is opposed to the defendant's contention, and appears never to have been expressly overruled: *The Ship Crescent* (4), per A. L. Smith L.J., who leaves the point open. The actual decision in *The Ship Crescent* (4), so far as it applies here, is in the defendant's favour. If once the point of law is raised in the county court, and the judge does not make a note, the appeal can be heard and determined on other evidence: Rules of the Supreme Court, 1883, Order LIX., r. 8.

Joseph, for the plaintiff. It is a condition precedent to the right of appeal that a request to make a note should be made to the county court judge in accordance with the statute. *Morgan* v. *Davies* (1) and *Seymour* v. *Coulson* (2) were before the County Courts Act, 1888. *Cook* v. *Gordon* (3) was decided since the Act, and is conclusive.

[CHANNELL J. It does not appear in that case whether the Court was satisfied that any question of law was raised at the trial.]

The last clause of s. 120 of the County Courts Act, 1888, limits the right of appeal given by the preceding portion of the section. The effect of the three sections, 120, 121, and 122, if read together, is to make the request to make a note a condition precedent. The duty to make a note does not arise until the request is made. Order LIX., r. 8, was made in 1884, and, if it is inconsistent with the County Courts Act, 1888, must be treated as repealed: *McGrah* v. *Cartwright*. (5) Sect. 124 shews that there can be no appeal unless the provisions of the Act are complied with.

LAWRANCE J. I think we have jurisdiction to hear this appeal. In order that the Divisional Court shall have jurisdiction to hear an appeal from a county court, it is necessary, in the first place, that there shall be a point of law, and, secondly,

(1) (1878) 3 C. P. D. 260.
(2) (1880) 5 Q. B. D. 359.
(3) (1892) 61 L. J. (Q.B.) 445.
(4) (1893) 62 L. J. (P. D. & A.) 63.
(5) (1889) 23 Q. B. D. 3.

1899

WOHLGEMUTHE v. COSTE.

Lawrance J.

that the point of law shall have been taken at the trial before the judge of the county court. By s. 120 of the County Courts Act, 1888, there ought to be a request to the county court judge to make a note of the question of law raised at the trial, and of the facts in evidence in relation thereto, and of his decision; but a point of law may arise at any time during the hearing, and it may not be possible to make a request to the judge to take a note until after the evidence has been given. I do not know what the learned county court judge means by saying that the point was not taken in accordance with the Act. The point of law was taken, and the county court judge has not made any note. It follows therefore that by Order LIX., r. 8, we have power to hear and determine the appeal on other evidence.

CHANNELL J. I agree that we have jurisdiction to hear the appeal. I have often heard judges say, and I have said myself, in cases where the circumstances came very near to those of the present case, that the Court could not hear the appeal, the county court judge's notes not being produced; but that is an ambiguous statement, for it may mean that the Court has no jurisdiction to hear the appeal, or it may mean that the Court has no materials before it on which the appeal can properly be heard. We must see what the Act of Parliament makes a condition precedent to the hearing of the appeal. The Act now in force, the County Courts Act, 1888, provides, by s. 120, that the party aggrieved may appeal, if dissatisfied with the determination or direction of the judge in point of law, and it has been stated in the House of Lords, in the case of *Smith* v. *Baker* (1), "that the point of law must be taken"; and, "that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the county court." What the House of Lords held there was that the point must be raised at the trial. Then, by the latter part of s. 120, it is imperative on the county court judge to make a note at the request of either party, but I cannot find in the section any words making it imperative on the party to request that a note

(1) [1891] A. C. 325, at p. 333, per Lord Halsbury L.C.

be made, so as to make his right of appeal depend on his having raised the point in a particular way. The words are, "the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter." Then s. 121 shews how the note is to come before the Court at the hearing of the appeal, when the county court judge has made a note. But it is contended that the words of s. 124, "No judgment or order of any judge . . . . shall be removed by appeal . . . . into any other court whatever, save and except in the manner and according to the provisions in this Act mentioned," shew that the request of the party to make a note is in every case a condition precedent to the hearing of an appeal; but if these words make anything directed by the last clause of s. 120 a condition precedent to the hearing of the appeal, they make the whole of what is there directed a condition precedent, and, if that is so, there is no jurisdiction to hear an appeal in any case where the county court judge does not make a note, and the power to hear the appeal on other evidence, if the notes of the county court judge are not produced, which is expressly given to the Court by Order LIX., r. 8, is gone. But I do not think this is the correct view, for there is nothing in the Act of 1888 to take away the power expressly given to the Court by Order LIX., r. 8.

Then what is it that the statute makes a condition precedent to the right of appeal? It is that the point of law must have been raised at the trial. As a general rule the Court before whom the appeal comes cannot have proof that the point of law was properly raised unless a request to make a note has been made. In the present case the learned county court judge clearly takes the view that counsel must ask him to make a note of the question of law, and of the facts in evidence, and of his decision, before the evidence is taken. He might have adopted the course taken in a recent case which came before a Divisional Court on appeal from a county court, where the judge stated on his note that he was unable to furnish a note of the whole evidence, because the point of law was taken,

1899

WOHLGEMUTHE v. COSTE.

Channell J.

and the request to make a note was made, after part of the evidence had been given. In the present case the defendant's counsel did raise the point of law. It is clear therefore that the point of law was raised at the trial, and we have jurisdiction to hear the appeal. Then the question arises, whether the Court ought to act on the optional power given by Order LIX., r. 8, and hear the appeal on other evidence in the absence of the judge's notes. As a general rule the Court would be slow to act on this power, and would decline to hear the appeal in the absence of the judge's notes, but the existence of the notes is not a condition precedent to the hearing of the appeal, and the question must depend on the conduct of the parties, and the circumstances of the particular case. In the present case I think the appeal ought to be heard.

Objection overruled.

The appeal was then heard on the merits, and dismissed, a shorthand note of the proceedings at the trial being received in evidence.

Appeal dismissed.

Solicitors for plaintiff: *Sismey & Sismey, for Tolhurst, Lovell & Clinch, Gravesend.*

Solicitor for defendant: *W. Henry Edwards.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1899
Feb. 7.

WHITE *v.* HEADLAND'S PATENT ELECTRIC STORAGE BATTERY COMPANY, LIMITED.

County Court—Costs—Remitted Action—Judgment under Order XIV. *for Part of Claim—Recovery in County Court of Residue—Scale applicable in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action brought in the High Court to recover 73*l.* 8*s.* 3*d.* as the price of goods sold and delivered an order was made under Order XIV. by which leave was given to the plaintiff to sign judgment for 53*l.* 8*s.* 3*d.*, and leave was given to the defendants to defend as to the residue of the claim, and it was ordered under s. 65 of the County Courts Act, 1888, that the action should be tried in the county court. The plaintiff signed judgment for 53*l.* 8*s.* 3*d.* under the order, and at the trial in the county court he recovered judgment for 20*l.*, the residue of his claim, and costs:—

Held, that the plaintiff was entitled to have his costs in the county court taxed upon the scale applicable where the amount recovered exceeds 50*l.*

Keeble v. *Bennett*, [1894] 2 Q. B. 329, approved of.

Bailey v. *Watson & Co.*, [1898] 2 Q. B. 270, overruled.

APPEAL from the order of a Divisional Court (Lawrance and Channell JJ.) affirming an order of the judge of the Westminster County Court.

In an action brought in the High Court for goods sold and delivered, in which the amount claimed by the indorsement on the writ was 73*l.* 8*s.* 3*d.*, an application was made by the plaintiff for judgment under Order XIV. Upon the hearing of the application the defendants set up a counter-claim. An order was made by which leave was given to the plaintiff to sign judgment for 53*l.* 8*s.* 3*d.*, and leave was given to the defendants to defend the action as to the residue of the claim, and it was ordered under s. 65 of the County Courts Act, 1888, that the action should be tried in the Westminster County Court. The plaintiff accordingly signed judgment for 53*l.* 8*s.* 3*d.*, and upon the trial of the action in the county court he obtained judgment for 20*l.*, the residue of his claim, and costs. The registrar taxed the costs subsequent to the order of the High Court upon Scale A, being the scale applicable in county courts

C. A. 1899

WHITE v. HEADLAND'S PATENT ELECTRIC STORAGE BATTERY COMPANY.

where the amount recovered exceeds 10*l.*, but does not exceed 20*l.*: and his decision was upheld by the county court judge. On appeal the Divisional Court affirmed the order of the county court judge on the authority of *Bailey* v. *Watson & Co.* (1)

Hansell, for the plaintiff. The action as brought in the High Court was an action for 73*l.* 8*s.* 3*d.*, and the whole action is transferred to the county court under s. 65 of the County Courts Act, 1888. In that action the plaintiff recovered more than 50*l.*, and therefore he was entitled to have his costs taxed on Scale C, which is the scale applicable in county courts where the amount recovered exceeds 50*l.* In *Bailey* v. *Watson & Co.* (1) the order of the High Court included costs, whereas in the present case the order for judgment for 53*l.* 8*s.* 3*d.* was silent as to costs. The case therefore was not finally disposed of as regards that part of the claim till judgment was given in the county court. This case falls within the decision in *Keeble* v. *Bennett*. (2) It is difficult to reconcile that case with *Bailey* v. *Watson & Co.* (1), and, if necessary, the plaintiff contends that the latter case was wrongly decided.

Eldridge, for the defendants. This case cannot be distinguished from *Bailey* v. *Watson & Co.* (1), which was rightly decided. The fact that the order of the High Court does not mention costs is immaterial, as those costs are given in such a case by ss. 65, 116 of the County Courts Act, 1888. In *Keeble* v. *Bennett* (2) there never was a final judgment for part of the claim in the High Court, and therefore the whole action was remitted to the county court; not merely a part of it as was the case here. By the order of the High Court that part of the action with which it dealt was finally disposed of, and in substance it was an action for 20*l.* only which was remitted to the county court, and only that amount can be considered as having been recovered in it. Therefore the correct scale of taxation has been applied in the county court. [He also cited *D'Errico* v. *Samuel*. (3)]

Hansell, in reply.

(1) [1898] 2 Q. B. 270. (2) [1894] 2 Q. B. 329.
(3) [1896] 1 Q. B. 163.

A. L. SMITH L.J. It appears to me that the judgment of the county court judge, and that of the Divisional Court, which affirmed it, were given on the assumption that they were bound by the decision in *Bailey* v. *Watson & Co.* (1); and that, if they had been free to decide on their own view of the matter, they would not have decided as they did. In this case the writ was indorsed with a claim for 73*l.* 8*s.* 3*d.* An order was made under Order XIV. giving leave to the plaintiff to sign judgment for 53*l.* 8*s.* 3*d.*, and to the defendants to defend as to the residue of the claim, and the action was sent down for trial in a county court. It is not material, I think, to consider why the plaintiff failed to obtain judgment under Order XIV. for the full amount claimed, but it seems to have been because the defendants set up a counter-claim. The plaintiff succeeded in recovering in the county court the residue of his claim, and consequently he recovered in the action altogether the amount of 73*l.* 8*s.* 3*d.* Primâ facie therefore the result appears to be that he would be entitled to have his costs in the county court taxed upon the scale applicable to cases where an amount exceeding 50*l.* has been recovered. As regards the costs incurred in the High Court in respect of the portion of the claim for which he obtained judgment under Order XIV., he would be entitled to have his costs taxed on the High Court scale, and as regards his costs in the county court he would be entitled to costs as upon a judgment for 73*l.* 8*s.* 3*d.* It is however argued that this is not so, and that, for the purposes of taxation in the county court, he must be looked upon as having recovered in the action only 20*l.*, and therefore is only entitled to costs taxed upon the scale applicable where that sum has been recovered. The question turns upon the true construction of s. 65 of the County Courts Act, 1888. I do not agree with the suggestion that, where that section is applied in such a case as this, the action is cut into two, remaining as regards the portion of the claim for which judgment has been given under Order XIV. a High Court action, but becoming as regards the residue of the claim an action in the county court to which the action is remitted for trial. The words of the section

(1) [1898] 2 Q. B. 270.

C. A. 1899

WHITE v. HEADLAND'S PATENT ELECTRIC STORAGE BATTERY COMPANY.

A. L. Smith L.J.

altogether negative such a contention. The section provides that, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.* . . . . an application may be made to a judge at chambers "to order such action"—not part of such action—to be tried in the county court, and upon his making an order to that effect the plaintiff shall lodge the original writ and the order with the registrar of the county court, and thereupon "the action" and all proceedings therein shall be tried and taken in such Court as if "the action" had been originally commenced therein. It is clear upon the words of the section that the whole of the action commenced in the High Court, which in this case was an action for 73*l.* 8*s.* 3*d.*, goes down to the county court where this section is applied. The section further provides that the costs of the parties in respect of proceedings subsequent to the order remitting "the action" shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order, and all proceedings previously thereto, shall be allowed according to the scale of costs for the time being in use in the Supreme Court. It being the whole action which has been sent down to the county court under the section, what is the amount which has been recovered in that action? Obviously the amount of 73*l.* 8*s.* 3*d.* The argument for the defendants is that, judgment having been given under Order XIV. for 53*l.* 8*s.* 3*d.*, it is only an action for 20*l.* which goes down for trial to the county court. As I have said, this is not so. Part of the claim having been adjudicated upon summarily in the High Court under Order XIV., the action then goes down to the county court for trial, it having been only then partially adjudicated upon. But the action is not cut into two as suggested. The result of the action is that the plaintiff has recovered part of his claim in the High Court, and part of it in the county court, but the amount recovered is all recovered in the one action which has been transferred to the county court. Therefore upon the true construction of s. 65 I think that, for the purposes of taxation of the costs in the county court, the plaintiff has recovered in this action more than 50*l.*, and is

entitled to have his costs taxed on the scale applicable to cases where more than that amount has been recovered. It was suggested that the proviso to s. 116 had some bearing on this question. In my opinion it has none. I think that the proviso to that section was inserted in order to meet cases where a plaintiff gets judgment under Order XIV. for an amount under 50*l*. I now come to the authorities on the subject. In the case of *Keeble* v. *Bennett* (1) a Divisional Court put upon s. 65 a construction identical with that which I have put upon it. If the Divisional Court in deciding *Bailey* v. *Watson & Co.* (2) are to be taken to have put a different construction on the section, I think they did what, having regard to the previous decision by which they were bound, they were not entitled to do. But I do not think that they really meant to overrule *Keeble* v. *Bennett*. (1) They endeavoured to distinguish it on the ground that in the case before them the plaintiff had got a judgment for part of his claim in the High Court with the costs, whereas in *Keeble* v. *Bennett* (1) he had not. But in my opinion that circumstance makes no difference in principle. The action which went down to the county court was one and the same action as that which had been brought in the High Court: and therefore the plaintiff was entitled to have his costs in the county court taxed upon the scale applicable to the total amount recovered by him upon his claim in that action. For these reasons I think the appeal must be allowed.

CHITTY L.J. I am of the same opinion. I think there was in this case but one action, part of the proceedings in which took place in the High Court, and the remainder in the county court. I do not think that the action can be regarded as having been split into two as suggested. The plaintiff had recourse to Order XIV., while the action, which had been commenced in the High Court, was still pending there, and obtained an order which gave him judgment for a portion of his claim, but was silent as to costs. The order gave the defendants liberty to defend the action as to the residue of the claim, and

(1) [1894] 2 Q. B. 329. (2) [1898] 2 Q. B. 270.

C. A. 1899

WHITE v. HEADLAND'S PATENT ELECTRIC STORAGE BATTERY COMPANY.

Chitty L.J.

transferred the case to the county court for trial under s. 65 of the County Courts Act, 1888. The amount for which judgment was given by the order was not allocated to any particular part of the plaintiff's claim, and therefore it was competent to the defendants to challenge any of the items in the plaintiff's particulars in the county court, although they could not succeed in reducing the total amount by more than 20*l.* The action proceeded in the county court, and in that court the plaintiff succeeded in recovering 20*l.*, the residue of his claim, so that the total sum recovered in the action was 73*l.* 8*s.* 3*d.* That being so, the question is upon what scale the plaintiff is entitled to have his costs in the county court taxed. I agree with what my Lord has said as to the construction of s. 65 and the proviso to s. 116 of the County Courts Act, 1888. The result is that there was one action only in which the plaintiff recovered an amount exceeding 50*l.* As to so much of the proceedings as took place in the High Court, the costs will be taxed on the High Court scale, and, as to so much of the proceedings as took place in the county court, the costs will be taxed on the county court scale applicable where an amount exceeding 50*l.* has been recovered in the action. The Divisional Court appear to have thought themselves bound by the decision in *Bailey* v. *Watson & Co.* (1) In my opinion that case was erroneously decided. I do not think that the circumstance relied upon by the judges as creating a distinction between that case and *Keeble* v. *Bennett* (2), namely, that in *Bailey* v. *Watson & Co.* (1) there had been a judgment in the High Court for part of the claim, made any material difference between the two cases. I think that *Keeble* v. *Bennett* (2) was rightly decided.

COLLINS L.J. I am of the same opinion, and, as we are differing from the Divisional Court, I will add a few words. The substance of the matter with which we have here to deal is, in my opinion, that there was one action and one action only. That action was remitted to the county court for trial with respect to a portion of the claim, which remained over after proceedings under Order XIV. I think the case is covered

(1) [1898] 2 Q. B. 270. (2) [1894] 2 Q. B. 329.

by the decision in *Keeble* v. *Bennett*. (1) Though I was a party to that decision, I approached this case without any bias, because the former case had altogether passed from my mind. Having heard the matter thrashed out in this case, I am of opinion that *Keeble* v. *Bennett* (1) was rightly decided. I was at first disposed to think that that case had been successfully distinguished in *Bailey* v. *Watson & Co.* (2), but, on consideration, it appears to me that the difference in fact which existed between the two cases does not make any difference in principle. I therefore think that the two decisions cannot stand together, and that *Bailey* v. *Watson & Co.* (2) was wrongly decided. When it is borne in mind that it is the one entire action, originally brought in the High Court, which is remitted to the county court, the case becomes simple. In this particular case, after a large portion of the claim had been recovered under Order XIV., the case was remitted to the county court for trial. There being no allocation of the amount for which judgment was given to any particular items of the plaintiff's claim, it is no doubt the fact that the plaintiff, on going to trial in the county court as to the residue, was bound to be prepared to substantiate every item in his claim; so that in this particular case there is clearly no injustice in dealing with the costs as in a case where a plaintiff has in a county court substantiated a claim for 73*l.* 8*s.* 3*d.* I do not, however, rely on that circumstance. I decide the case on the ground that there was but one action, which, having been commenced by the original writ in the High Court, was afterwards remitted to the county court for trial as to a portion of the claim, and the total amount recovered in that one action exceeded 50*l.*; and consequently the county court costs must be taxed on the scale applicable to actions in which an amount exceeding 50*l.* is recovered. If the total amount recovered in the action exceeds 50*l.*, I think that, however minute the portion of the claim which is recovered in the county court may be, the scale applicable must depend upon the total amount recovered.

There were two illustrations put forward in the course of

(1) [1894] 2 Q. B. 329. (2) [1898] 2 Q. B. 270.

C. A. 1899

WHITE v. HEADLAND'S PATENT ELECTRIC STORAGE BATTERY COMPANY.

Collins L.J.

the argument which the defendants' counsel did not, I think, satisfactorily meet. One of them was as follows: Suppose money is paid into court in an action without any proceedings under Order XIV., and after that the action is remitted to the county court; the defendants' counsel could not deny that in that case the amount ultimately recovered would embrace the amount paid into court, and the plaintiff would be entitled to costs on the scale applicable to the total amount so recovered. It was contended that that case was not parallel to a case where there had been judgment for a portion of the claim under Order XIV., and that the result of such a judgment was to cut the action into two. But, in order that such a result might be produced, legislation would be necessary to the effect that, where judgment is given for a portion of the amount claimed under Order XIV., and the action is remitted to the county court for trial as to the residue, the action so remitted shall be considered to be an action for the residue only. But that is not the law. The law is that it is the one entire action based on the original writ which is remitted. Another illustration was put by my Lord to which the defendants' counsel gave no answer. Suppose there were an action for a sum exceeding 50*l.*, and, judgment for 19*l.* having been obtained under Order XIV. and the action remitted to the county court for trial as to the residue, the plaintiff recovered 32*l.* in the county court. According to the contention for the defendants, the action must be considered as finally determined by the judgment under Order XIV., so far as the High Court is concerned, on the basis that less than 20*l.* is recovered: and the result would be that in the High Court the plaintiff would get no costs, and in the county court he would get costs only on the scale applicable to cases where the sum recovered exceeds 20*l.*, but does not exceed 50*l.*, although the total amount recovered would exceed 50*l.* It seems to me obvious that this cannot be right. Upon these grounds I am of opinion that the appeal must be allowed.

Appeal allowed.

Solicitor for plaintiff: *T. G. Bullen.*

Solicitors for defendants: *Lucas & Ward.*

E. L.

In re An Arbitration between THE COUNTY COUNCIL OF BUCKINGHAMSHIRE and THE COUNTY COUNCIL OF HERTFORDSHIRE.

1898
Dec. 17, 19.
1899
Jan. 12.

Local Government—Transfer of Part of one County to another County—Adjustment of Liabilities—Local Government Act, 1888 (51 & 52 *Vict.* c. 41), *s.* 62.

By an order made under the Local Government Act, 1888, part of the county of B. was transferred to the county of H. The portion so transferred contained no county bridges and no main roads:—

Held, that the arbitrator appointed by the Local Government Board under s. 62 had power to award to the county of B. a sum of money in respect of the loss to that county of an area which contributed to expenditure on bridges and main roads without involving the county in any corresponding outlay on its own account.

Special Case stated by an arbitrator under s. 62, sub-s. 3, of the Local Government Act, 1888.

The county councils of Buckingham and Hertford having failed to make an agreement for the purpose of adjusting property, income, debts, liabilities, and expenses in respect of the transfer of the parish of Nettleden and part of the parish of Ivinghoe from the county of Buckingham to the county of Hertford, the Local Government Board, under s. 62, sub-s. 2, of the Local Government Act, 1888, appointed an arbitrator.

In his award the arbitrator awarded (inter alia) a sum of money to be paid by the county council of Hertford to the county council of Buckingham in respect of bridges and main roads. In the part of the county of Buckingham which had been transferred to the county of Hertford there were no county bridges and no main roads, and the arbitrator therefore awarded a sum equivalent to the capitalized value of the contribution which the transferred portion of the county of Buckingham had been paying towards the county expenditure on bridges and main roads without involving any outlay in

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

this respect. The question raised by the case was whether he had power to award compensation on this footing. (1)

Wedderburn, Q.C., and *Lord Robert Cecil*, for the county of Hertford. The arbitrator was wrong. There was no matter requiring adjustment in respect of bridges and main roads. The liability of the county council of Buckingham in respect of these was the same after the transfer as before, since the part transferred contained neither county bridges nor main roads. The loss of a part of the rateable value is not per se a matter for adjustment. The arbitrator was not entitled to give to the county of Bucks the advantage which they derived from drawing rates from the transferred area and spending nothing upon it. No doubt if there had been county bridges or main roads in the part transferred there would have been something to adjust; but under the circumstances there was nothing. If, however, there was any power to give compensation to the

(1) By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 62, "(1.) Any councils or other authorities affected by this Act, or by any scheme, order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses so far as affected by this Act, or such scheme, order, or thing of the parties to the agreement, and the agreement and any other agreement authorized by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations may provide for the transfer or retention of any property, debts, and liabilities with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of a terminable annuity for a period not exceeding that allowed by the commissioners under this Act, or the Local Government Board.

"(2.) In default of an agreement as to any matter requiring adjustment for the purpose of this Act, or any matter which in case of difference is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by this Act, such adjustment or difference may be made or determined by an arbitrator appointed by the parties, or, in case of difference as to the appointment, appointed by the Local Government Board.

"(3.) An arbitrator appointed under this Act shall be deemed to be an arbitrator within the meaning of the Lands Clauses Consolidation Act, 1845 . . . . and further, the arbitrator may state a special case. . . . ."

county of Bucks, it must be found in s. 62 of the Local Government Act, 1888. That section only relates to agreements "for the purpose of the adjustment of any property, debts, liabilities, or financial relations." Loss of rateable value does not fall under either of those heads. It is plain, from the latter part of the section, that the object of the section is not compensation, but adjustment—that is to say, the equitable division of the property, debts, and liabilities. The mere absence of liability to repair bridges and main roads in the transferred portion is not a thing which can be divided or adjusted, nor is the power to levy a rate on the part transferred property or income "affected by" the scheme. The income of the county council is the same although the income-producing area is diminished. The individual liability of the ratepayers of the county may be affected by the transfer, but the section, which deals solely with county councils and other authorities, has nothing to do with that. The transfer does not affect income, but only the sources of income. Sect. 32, which relates to the adjustment of financial relations between counties and county boroughs, is in much wider terms, and has regard to the interests of the county and the borough, and not merely, as is the case in s. 62, to the authorities of such county or borough. In *In re Rochdale Union and Haslingden Union* (1), which was decided on s. 68 of the Local Government Act, 1894, a section which is in much wider terms than s. 62 of the Local Government Act, 1888, it was held that the loss of the contribution of the part transferred was not a matter which required adjustment.

Macmorran, Q.C., and *James Fox*, for the county of Buckingham. The arbitrator was right. The transfer was, as regards bridges for instance, a clear gain to the county of Herts and a loss to the county of Bucks, since the former gained and the latter lost a taxable area which had no expenses in this respect. The area retained by the county of Bucks had, therefore, to make up by additional rates for this loss. The liability of the county was consequently increased in Bucks and diminished in Herts, at any rate as regards the repair and maintenance of

(1) [1898] 2 Q. B. 206; post, p. 540.

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

bridges. That is a subject for adjustment. "Liability" is the pecuniary liability imposed on the county. This liability now falls on a smaller area in Bucks than it did before the transfer.

The proper method of adjustment is to ascertain the income paid to the county by the transferred area and the expenses to which the county has been put in respect of that area, and to set off the one against the other. *In re Rochdale Union and Haslingden Union* (1) is no authority, since it was decided on a different statute.

Wedderburn, Q.C., replied.

Cur. adv. vult.

Jan. 12. The following judgment was read by

WILLS J. A portion of the county of Bucks has been by order of the Local Government Board transferred to the county of Herts. In this portion there are no main roads and no county bridges. An arbitrator appointed under s. 62, sub-s. 2, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), has considered that Bucks is losing an area which helped to find the money for the county expenditure on bridges and main roads without involving it in any corresponding outlay on its own account. It was therefore, so to speak, a valuable asset of Bucks, and the arbitrator heard evidence which convinced him that it was likely to remain permanently under the same conditions, and on that footing he has awarded to Bucks a sum of money as the capitalized value of this contribution. The question is whether he had power to award compensation on this footing. It is under s. 62 that his powers arise, and they embrace neither more nor less than under sub-s. 1 of that section might be done by agreement. That sub-section says that any councils or other authorities affected by the Act itself—or, amongst other things, by such an order as that now in question—may "make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses" of the respective councils "so far as affected by" the order; and the agreement, or any agreement under s. 32—of which more hereafter—"may provide for

(1) [1898] 2 Q. B. 206; post, p. 540.

the transfer or retention of any property, debts, and liabilities" (omitting here the word "income") "with or without any conditions, and for the joint use of any property, and for payment by either" council "in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint user, and in respect of the salary, &c., payable to any officer or person." It is clear that the power to make agreements extends to and is limited to the adjustment of property, income, debts, liabilities, and expenses. It is equally clear, for the word "adjustment" so implies, that the enactment is meant to meet the cases in which either the property, income, debts, liabilities, or expenses, or more than one of these enumerated things appertaining to one or other or both of the councils, is or are disturbed by the order; and the cases in which such agreements will be necessary are those in which the disturbance takes the practical shape of money loss of one sort or another to one of the councils or authorities. If there is none, there will be no need of adjustment. Property is in this instance disturbed, as the county buildings are retained in their entirety by Bucks, so that the county reduced in area acquires the share in the county buildings of, so to speak, the retiring or extruded partner. The specific provisions that the retention of property may be provided for and paid for cover this part of the award and free it from difficulty. The repair of the main roads and bridges within the county is undoubtedly a liability to which the county council is subject. In my opinion it is disturbed by the subtraction of a material part of the area liable to contribution, and is a proper subject for adjustment. Mr. Wedderburn has argued that the liability remains the same. The council, as representing the county, still is, as it was before, liable to repair the main roads and bridges, and therefore, it is said, there is no alteration of liability, and nothing to adjust. I think this is a very narrow view. I think that where the same liability has to be met and paid for by a reduced area there is a liability which, though not changed in its nature, requires to be adjusted between the two counties, and I think it is just the sort of case which the ample words of the first part of the section were intended to meet. "Adjustment" is a very large

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

Wills J.

word, and, except when applied to marine insurance, has no technical meaning that I am aware of, and was, I think, used for the purpose of enabling justice to be done. I cannot see upon what principle the Legislature would be likely to take away a remunerative area from county A. and give it to county B. without some compensation, and I think the power to "adjust" the liability gives the power in question in language sufficiently appropriate. "Affected" is, like "adjusted," not a word of art, but a word of ordinary English. It is capable of a very large meaning, and was, I think, purposely used for that reason. The very object of the section was to enable that to be done which under the circumstances should be just and reasonable, and I cannot see why we should give effect to minute verbal criticism in order not to further but to defeat that end. Mr. Wedderburn has argued that the phrases which come later in the section, and define the matters as to which the councils may in their agreement provide for transfer or retention and for the payment of money in respect of such transfer and retention, are less ample than those as to which for the purpose of adjustment the councils may make an agreement, and has contended that the first part of the section is limited by what follows. I do not agree with this argument. In the first place, the phrases supposed to have this limiting effect apply just as much to s. 32 as to s. 62. They are even incorporated into s. 32 itself (see sub-s. 5), and it is impossible to contend that there they are intended to limit the ample words in which the power is given of dealing with the financial relations of counties and boroughs. In the second place, the section is of the most general kind, and intended to have the most general application and to provide for a multitude of possible cases, the details of which it would have passed the wit of man to foresee. It applies in terms to councils (which may be county councils or borough councils) and to authorities who may be highway authorities, urban authorities, rural authorities, guardians of the poor, and perhaps others besides, and the particular cases to which it may have to be applied are endless. The argument has proceeded far too much as if county councils and a transfer of an area from one jurisdiction to

another were the only thing contemplated by the section. It is obvious that in the working of such a scheme as that of the Act cases might occur in which property or liabilities (to take two words as illustrations) might either be made the subjects of transfer or retention by express agreement, or might be left, so to speak, to themselves and to the inevitable operation of the order, whatever that might be. It is obvious also that if they were made the subjects of express transfer or retention the most natural way of adjusting any inequalities between the two councils introduced by the transfer was by settling a sum to be paid for transfer or retention. But even in that case it might be convenient and might in some of the thousand and one cases to which the section may be applied be practicable to effect adjustment in some other manner, and it is absurd to suppose that such a power is excluded, as it would be if Mr. Wedderburn's narrow contention were adopted. Many illustrations could, no doubt, be given by persons more familiar with the practical details of local government than myself. It seems to me equally obvious that, without express transfer or retention of specific property or liabilities, the order which gives rise to the application of s. 62 may affect either property or liabilities. An illustration of its affecting property as distinguished from mere transfer or retention is afforded by the case of *In re Rochdale Union and Haslingden Union* (1), where by alteration of the boundaries of two unions a workhouse was left on the hands of one too large for its wants and, therefore, a source of unnecessary expense to it. The present case appears to me to afford as good an illustration as any other of how a liability may be affected by an order without there being anything which could be made the subject of transfer by agreement between the councils. Whatever change has been effected in the liability of either Bucks or Herts is the inevitable consequence of the alteration of county boundaries so far as the main roads are concerned. Bucks is now relieved from the obligation of repairing within the transferred area any roads which hereafter may be declared to be main roads, and Herts assumes that liability. That is a matter for adjustment, and if the arbitrator

(1) [1898] 2 Q. B. 206; post, p. 540.

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

Wills J.

had not been satisfied, as we are told he was, by evidence that there was no reasonable probability of any of the roads in the transferred area ever becoming main roads, he ought to have allowed, and no doubt would have allowed, a sum to Herts in that respect. But these are not all the elements of adjustment, nor is this the only liability or the only kind of liability affected. Assuming that there will be no expenditure necessary in the transferred area for either main roads or bridges, Bucks, reduced in area, is still liable to repair the same main roads and bridges as before. Herts, increased in area, has no addition to the burden of liability for main roads and bridges. Can a subject be conceived more fit for and more calling for adjustment? It is conceded that, if there had been main roads and bridges within the transferred area, it would have been proper to take into account, in the process of adjustment, the cost thus transferred and the rate-producing value of the area, not as what Mr. Wedderburn calls a "mechanical factor," but as an element in the adjustment. It seems to me nothing short of a reductio ab absurdum to say that the Act allows adjustment in such a case where the sum required for adjustment may be trivial, and yet forbids it when the sum is likely to be considerable, as it is in a case like the present, where the cost to the county of administering the area is small in comparison with its contribution to the rates.

Again, does not the order affect the incomes of the two councils? Mr. Wedderburn says no. It affects only the sources of income, and a rate of 1*s.* in the pound over an area of A. acres will produce just as much and just as little as one of 11*d.* in the pound over an area of twelve-elevenths of A. acres, or as one of 13*d.* in the pound levied over an area of twelve-thirteenths of A. acres. This seems to me to give a singularly narrow meaning to the expression "income affected by" the change of areas. I think the income *is* affected by the change. Practically there are limits to taxation even though none be fixed by Act of Parliament. Income is "affected" when it has to come from a diminished number of contributors. It is equally affected where it has to come from an increased number of contributors. Can there be a

more appropriate subject of adjustment? It is not surprising that income should not figure eo nomine in the subsequent enumeration of the subjects of transfer or retention mentioned as the matters to be dealt with by express agreement. The income is, in the sense in which I am using it, the money derived from the rates. That is not at all likely to be made the subject of express transfer or retention. It is one of the things which the order transferring the area necessarily transfers, and it was therefore unnecessary to deal with it in the latter part of the section.

Great stress has been laid upon the fact that different language is used in s. 32 as to adjustments of financial relations between counties and county boroughs. I do not myself feel the force of this argument. Sect. 62 is a much more general section than s. 32, and has a far wider application. I do not see at all what reason there is for supposing that the general object aimed at by the two sections was not the same. An equitable adjustment respecting financial relations is spoken of in s. 32. In s. 62 an adjustment of property, income, debts, liabilities, and expenses is spoken of. Is it to be the less equitable because it is not so described in terms? Is it to be unjust because the Act does not say it is to be just? The county and the county boroughs are by s. 32 neither of them to be placed in a worse financial position by reason of the boroughs being constituted county boroughs. Surely in s. 62, though it is not said so, the intention is that justice shall be done between the two counties ordered to alter their boundaries. Justice in such a case means at the very least that neither county shall obtain any material advantage at the expense of the other. An adjustment means a just adjustment. In the present case, if it be true that the transferred area is such as to contribute much to, but to take little out of, the common fund, justice requires that the county which loses it should be paid something by the county which gains it. How much is for the arbitrator to say. And surely the power to adjust the property, income, debts, liabilities, and expenses of the two councils (so far as affected by the order) is ample enough to enable justice to be done.

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

Wills J.

But it was said that there was a broad distinction between s. 32 and s. 62, inasmuch as s. 32 dealt with the rights and responsibilities of counties and boroughs, whilst s. 62 deals with those of authorities, and it was said, for instance, that the revenue of a county might be affected by the reduction of its area, whilst that of the council, which could increase its rate from, say, 1*s.* to 1*s.* 1*d.* in the pound, was not so affected. This is a specimen of the minute verbal criticism on which the argument for the appellants is founded and by which alone it can be maintained. Councils and authorities are not entities existing apart from the communities which they represent. Their rights and liabilities are created (theoretically at least) for the advantage of those communities and of the public at large, and for no other purpose. And it is, to my mind, absurd to say that there can be any difference so far as the great object of making a just arrangement between those affected by changes of an existing status is concerned, according as counties or only county councils are concerned. It is the living persons, the ratepayers and inhabitants whom the council represents in the one case, and the county consists of in the other, with whom and whose interests all such provisions as we are now considering are really concerned; and the measure of their interest in the matter does not depend upon whether rights and liabilities to be enjoyed or borne for their benefit alone are spoken of as appertaining to a county or to a county council.

It was lastly contended, though perhaps this is much the same argument as one with which I have already dealt, that councils have power not to adjust by agreement such property, income, &c., but only to make agreements for the purpose of adjusting them, the subjects of which agreements are by the latter part of the section limited to matters of which that now in question is not one. I confess that to my mind the distinction between making agreements for the purpose of adjusting and adjusting by agreement appears to be playing with words, and that to limit the ampler words used in the first part of the section by the narrower ones used later in the section would be to treat the section as providing, not for an equitable, but for an unjust adjustment.

A very few words about the case of *In re Rochdale Union and Haslingden Union* (1) and I have done. In that case the Court was asked to say which of a number of specified matters required adjustment on the transfer of an area from one union to another. The Court said that their opinion was not necessary for the judgment to be given in the case, but it was willing to assist the parties by giving an opinion, and expressed the opinion that the loss of all contribution from the transferred area and the increase in the rates leviable in the reduced area were not in themselves matters requiring adjustment, but were elements to be taken into account in considering how the burden and liabilities requiring adjustment should be adjusted. I am not quite sure that I understand exactly what is meant; but I am by no means sure that there is anything in the expression from which I should dissent. The loss of the contribution to rates from the transferred area certainly does not require adjustment per se, but only if the transferred area happens to be a remunerative or an onerous one to one of the bodies affected by the transfer, and the phrase "the increase" of the rates leviable upon the reduced area implies that the reduced area is a loser by the transfer, which is just the case in which justice calls for an adjustment. I do not think there is anything in the Rochdale case which conflicts with my judgment. If there are liabilities to be adjusted and these matters are to be taken into consideration, it is quite immaterial whether you treat them as subjects for or elements in adjustment. For these reasons I am of opinion that the county of Bucks is entitled to our judgment, and, as the attempt has been made to disturb an award, with costs.

BRUCE J. read the following judgment:—I agree in the result at which my learned brother has arrived.

The question raised by the award for our determination concerns the power of the arbitrator to deal in the circumstances of the present case with the items in the award affecting county bridges and main roads. His jurisdiction extends to the same matters as those concerning which councils and other

(1) [1898] 2 Q. B. 206; post, p. 540.

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

Bruce J.

authorities affected by the Act, or by any scheme, order, or thing made or done in pursuance of the Act, are enabled to make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as affected by the Act, scheme, order, or thing of the parties to the agreement (Local Government Act, 1888, s. 62, sub-ss. 1, 2). Thus the question we are to decide is, What are the matters in respect of which councils and other authorities may make such agreements as I have mentioned? That question turns upon the construction of sub-s. 1 of s. 62, and turns, I think, so far as the matters raised for decision in this case are concerned, upon the words in the earlier part of it—that is, upon the part of it ending with the words "parties to the agreement."

By this part of the section power is given to councils affected by any order made in pursuance of the Act to make agreements for the purpose of adjusting any property and other things mentioned, of the parties to the agreement, so far as affected by such order.

In the present case a Provisional Order has been made in pursuance of the Act by which a certain area of the county of Bucks has been made part of the county of Herts. There can be no doubt that the county council of Bucks and the county council of Herts are both affected by this order. Therefore, if the other conditions imposed by the section were satisfied the two county councils would have power to make agreements for the purpose of adjusting their property and other things mentioned, so far as affected by the order. It becomes necessary to consider the meaning of the words "make agreements for the purpose of adjusting." I entertain no doubt that when the Legislature used those words it intended that the agreements to be made should be such as to answer the purpose for which they were to be made, and that the words mean that the county councils may adjust the matters mentioned by agreement.

If the first part of the sub-section stood alone, there could be no doubt that this would be its meaning. It was urged by Mr. Wedderburn that the words in the first part of the sub-section are limited by the words in the second part. I do not

think that contention is sound. The words in the first part of the sub-section confer, as it seems to me, a power quite independent of the additional and supplementary powers conferred by the words in the second part of the sub-section. I will consider the words in the second part of the sub-section presently; but I confine myself now to the words in the first part of the sub-section, because I think it is best to take the words of the enactment in the order in which they occur. If there is power to make an agreement for adjusting, the question arises what is meant by adjusting. The word "adjustment" is a word in common use. It is commonly applied to the settlement among various parties of their several shares in respect of claims, liabilities, or payments relating to a general average claim. That is not its only application: it is a word which is applied to other matters in the same manner in which it is commonly applied in marine insurance. When there are matters which require rearranging, regulating, setting right, or equalising, so as to restore the true balance, the process of so rearranging, setting right, regulating, or equalising may be described as adjusting. The words of the sub-section mean that when any two county councils are affected by a provisional order so that the property, income, debts, liabilities, and expenses of either of them are thrown out of balance, then the county councils may by agreement settle a sum of money to be paid by one to the other to adjust the balance. It was contended by Mr. Wedderburn that adjustment did not include compensation by means of a money payment. I cannot agree. I think one way, and the most natural and obvious way, of adjusting the rights of parties whose property, income, debts, liabilities, and expenses have been affected is by making a money payment by way of compensation to the party who sustains a loss, or, in other words, is prejudicially affected. Sub-s. 6 of the very section now under consideration makes it clear that the Legislature, when it spoke of adjustment, included a money payment. By that sub-section provision is made for raising on loan such capital sum as may be required for the purposes of the *adjustment*. It is true that other words follow: "or of an agreement . . . . or of any award." But for the purpose

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

Bruce J.

of determining the meaning in which the word "adjustment" is used, it is enough that the Legislature should have used express words to shew that it contemplated a money payment for (among other purposes) the purposes of *adjustment*.

The next question that arises is, Can there be said to be, so far as concerns county bridges and main roads, any property, income, debts, liabilities, or expenses of either county council affected by the Provisional Order? The question is raised in the neatest form with regard to county bridges, and it will be convenient to consider that first. In the part of Bucks transferred to Herts there were no county bridges, and we were told in argument that there were not even any streams over which bridges which could become county bridges could be built. Therefore, when the Provisional Order came into force, the county council of Bucks and the county council of Herts each remained liable to maintain the same county bridges as before. What has taken place is this—that a portion of the rateable area of Bucks has been made over to Herts; so that although the county council of Bucks has been deprived of the contribution to the rates which was made by the rateable area so transferred, it is left with the undiminished burthen of repairing the county bridges in the rest of Bucks. In these circumstances it seems to me not necessary to consider whether the *liability* of either county council was affected by the Provisional Order, because I am clear that the *income* of the county council of Bucks was affected, and upon that I am content to rest my decision, without giving any opinion upon the question whether the liability of either county council was affected.

It was said in argument by the learned counsel who argued on behalf of Herts that the loss of a rateable area was not a loss of income, and that the right to levy rates in a rateable area was nothing more than a source of income. But even so, if a source of income is taken away from a county council, it is surely unreasonable to say that the income which would otherwise flow from that source remains unaffected. I think if an Act of Parliament prevented a man from carrying on a business which was a source of income to him, that it would

take a great deal of argument to convince him, or indeed any other person, that his income was unaffected by the Act.

It was contended that, even if the affecting of a source of income could be considered as affecting income, yet that in the present case the income affected could not be regarded as the income "of the parties to the agreement"—that is, could not be considered as the income of the county council of Bucks. The words "property and income" are used in the sub-section in contradistinction to the words "debts and liabilities." On the one hand the sub-section provides for the obligations of either county council being affected, and on the other hand it provides for the resources intended for the discharge of those obligations being affected, and in all cases rates are an important source from which county councils obtain the money necessary to enable them to discharge the obligations cast upon them by law; and I entertain no doubt that when the sub-section speaks of liabilities it includes the liabilities cast upon a county council by law, so when it speaks of income it means the money which the county council is entitled to raise or receive for the purpose of fulfilling those obligations. For these reasons, I think that the income of the county council of Bucks was affected, and was affected prejudicially, by the Provisional Order transferring a rateable area to Herts, and as there was not as regards county bridges any corresponding burthen or liability in respect of the area so transferred, I think the arbitrator was right when he made the adjustment as to county bridges in the manner he did.

As regards main roads, the case seems to be substantially the same. It is a little complicated by the circumstance of which we were informed during the argument—that since the transfer roads in the transferred area have been declared by the county council of Herts to be main roads. But this is a matter not raised by the case. We are not asked to deal with any question concerning the details of the adjustment. We are only asked whether in making the adjustment the arbitrator was entitled to base calculation on and afford consideration to the items mentioned in the claim and award. As to main roads, my answer is in the affirmative.

1899

BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL, *In re.*

Bruce J.

I do not deal with the remaining items in the award, because as regards those items no objection was raised.

As the second part of the sub-section was relied upon by Mr. Wedderburn in his argument, I will state my reasons why I think it has no bearing on the matter before us. But for clearness' sake, I should premise that when I speak of the second part of the sub-section I leave out of consideration altogether the words beginning "And any other agreement" down to the words "financial relations." That part of the sub-section, it is admitted, has no bearing upon the present question.

I have already said that I think that the first part of the sub-section provides for an adjustment or a money payment in order to strike a just balance in respect of the resources and liabilities of county councils affected by a Provisional Order. It seems to have occurred to the framers of the Act that it might in some cases have been inconvenient to make adjustment solely by means of a money payment, and that cases might arise in which it would be of advantage to agree, by way of adjustment, for the transfer or retention of property, debts, and liabilities, or for the joint use of property or for the transfer of duties, or partly in that way, and partly by money payments in respect of the property, debts, duties, and liabilities so transferred or retained by agreement, or agreed to be jointly used. The object of the second part of the sub-section was to give those powers, which are clearly powers of a very special kind, in addition to the powers conferred by the first part of the sub-section; just as the special power to deal with the salary, remuneration, or compensation of officers is clearly an independent power, which could not be exercised without the special words in the second part of the sub-section. It is to be observed that the money payment mentioned in the second part of the sub-section can only be made in respect of property, &c., &c., transferred or retained by *agreement*. Even granting that an agreement for the transfer or retention of property, &c., made under the second part of the sub-section is a "thing" made or done in pursuance of the Act within the meaning of the first portion of the sub-section, yet it cannot be reasonably

contended that the Legislature intended compensation to be made by money payment only in cases where property, &c., has been transferred or retained by agreement, and that no sanction should be given for compensation by a money payment where property, &c., had been affected by the Act, scheme, or order. Yet it seems to be clear that, unless the words in the first part of the sub-section give power to adjust by means of making a money compensation in cases where property, &c., is affected by the Act, scheme, or order, there is no power to adjust by a money compensation in such a case.

It seems to me that when the words in the second part of the sub-section are carefully examined, they must be construed as giving powers quite independent of the power of adjustment given in the first part of the sub-section, and as in no way limiting the earlier words.

As regards the case of *In re Rochdale Union and Haslingden Union* (1), I have only to say that, had that case decided the points raised in this case, I should have been only too glad to have followed that decision. But I think it is clear that there was no decision in that case upon the points raised here; and, so far as the dictum in the judgment of Channell J. is concerned, which seems to have some bearing upon this case, it is to be remembered that it related to a section of another statute containing words different from the words in the section we have to construe.

Judgment for the county of Bucks.

Solicitors for county of Herts: *J. N. Mason & Co., for C. E. Longmore, Hertford.*

Solicitors for county of Bucks: *Pyke & Parrott, for W. Crouch, Aylesbury.*

(1) [1898] 2 Q. B. 206; post, p. 540.

A. P. P. K.

1899
Feb. 3, 10.

THE QUEEN *v.* JUSTICES OF LONDON.

Poor Law—Poor-rate—Distress Warrant—Appeal.

An appeal will not lie against the issue of a distress warrant for poor-rate before the distress has been levied.

RULE for mandamus to quarter sessions to hear an appeal against the issue of a distress warrant for rates.

On July 25, 1898, a demand note for 56*l.* 4*s.* 9*d.* for rates made on May 12, 1898, in respect of a house No. 291, Strand, was served upon the Palmerston Publishing Company by the collector of rates for the parish of St. Clement Danes. The sum was made up as follows: Poor-rate, 30*l.* 13*s.* 6*d.*; General rate, 20*l.* 9*s.*; Sewers rate, 5*l.* 2*s.* 3*d.* Upon the Palmerston Publishing Company refusing to pay the sum demanded, the overseers obtained a summons calling on the company to shew cause why they had not paid.

On August 30 the solicitor of the company attended before the justices, and was prepared to establish that the Union Publishing Company and not the Palmerston Publishing Company were the occupiers of the house 291, Strand, and were liable as such for the rates in question, that the Palmerston Publishing Company occupied only two rooms in the house as undertenants to the Union Publishing Company, and that the Palmerston Publishing Company had never been rated in respect of the said premises.

The name appearing in the occupiers' columns of the poor-rate book and the general rate book was "Union Publishing Company, Limited, per Palmerston Publishing Company, Limited," but the words "per Palmerston Publishing Company, Limited," were in fact added in the case of the poor-rate book some time in July, 1898, and in the case of the general rate book at some date subsequent to August 25, 1898, both the rates having been made on May 12. In the sewers rate book the occupiers' column was left blank. The justices, however, declined to receive any evidence or to go into the question of

occupation; they held that the Palmerston Publishing Company were rated, and they issued their distress warrant for the amount of the rates. The Palmerston Publishing Company appealed to quarter sessions, and the execution of the warrant was suspended. Upon the case coming on for hearing, the quarter sessions held that they had no jurisdiction to entertain the appeal. The Palmerston Publishing Company then obtained a rule for a mandamus to the justices to hear the appeal.

J. P. Grain, shewed cause on behalf of the overseers. There can be no appeal unless a right of appeal be given by some statute, and there is no statute which gives a right of appeal from the issue of a distress warrant. It is true that by the Poor Law Act of 43 Eliz. c. 2, s. 6, it is provided, "That if any person or persons shall find themselves grieved with any cess or tax, or other act done . . . . by the said justices of peace; that then it shall be lawful for the justices of peace at their general quarter sessions or the greater number of them to take such order therein as to them shall be thought convenient; and the same to conclude and bind all the said parties." But the acts of justices there referred to as being appealable are judicial acts, such as the exercise of the jurisdiction given by s. 3 to relieve a parish from the burden of maintaining its poor where not of sufficient ability to do so, and to impose that burden on another parish. The issue of a distress warrant is a purely ministerial act. There is no trace in the books of the mere issue of such a warrant having been made the subject of an appeal. Again, the party against whom the warrant is issued is not grieved by the issue of the warrant; he can have no grievance until distress levied. Nor is there any right of appeal given by 17 Geo. 2, c. 38. That Act was passed for the purpose of providing for the punishment of parish officers who did not properly account for money received by them. And s. 4, which says "that in case any person or persons . . . . shall find him, her, or themselves aggrieved by any . . . . act . . . . done . . . . by any of Her Majesty's justices of the peace" it shall be lawful for such persons to appeal to the next

1899

REG. v. LONDON JUSTICES.

general quarter sessions, is referring to acts done by justices in the way of imposing the penalties provided by the earlier sections on defaulting parish officers; it has nothing to do with the issue of distress warrants. Sect. 7 (1) does indeed provide that an appeal may be brought by a person who is aggrieved by a distress, but it does not give any appeal against the issue of a warrant not followed by actual distress: *Reg.* v. *Justices of Kent.* (2)

J. B. Matthews, in support of the rule. The proposition that the issue of a distress warrant for rates is a merely ministerial act is incorrect. No doubt the parties cannot on the application for a warrant go behind the rate and entertain any matter which would be ground of objection to the rate itself. But in many other respects the justices act judicially: *Harper* v. *Carr.* (3) They are bound to satisfy themselves that the person summoned is the person rated, and here they refused to hear evidence to shew that the Palmerston Company were not the persons rated. Then, if so, there was a right of appeal under s. 6 of the Act of Elizabeth, for the language of that section is perfectly general; the words "or other act done . . . . by the said justices of peace" include the issue of a distress warrant under s. 4 of that Act. A person is grieved by the issue of the warrant immediately that it is issued; it cannot be that he must wait until the distress has been levied and actual loss has happened. In *Rex* v. *Forrest* (4) it was held that an

(1) 17 Geo. 2, c. 38, s. 7: "And for the more effectual levying money assessed for the relief of the poor, be it enacted by the authority aforesaid, that the goods of any person assessed, and refusing to pay, may be levied by warrant of distress, not only in the place for which such assessment was made, but in any other place within the same county or precinct; and if sufficient distress cannot be found within the said county or precinct, on oath made thereof before some justice of any other county or precinct (which oath shall be certified under the hand of such justice on the said warrant) such goods may be levied in such other county or precinct by virtue of such warrant and certificate; and if any person shall find him or herself aggrieved by such distress as aforesaid it shall and may be lawful for such person to appeal to the next general or quarter sessions of the peace for the county or precinct where such assessment was made, and the justices there are hereby required to hear and finally determine the same."

(2) (1867) 16 L. T. (N.S.) 672.

(3) (1797) 7 T. R. 270.

(4) (1789) 3 T. R. 38.

appeal lay under s. 6 by parishioners against the appointment by justices of certain persons as overseers, although there was no suggestion there that the appointment had resulted in any loss to the parish. Every objection which could be raised to an appeal against the issue of a distress warrant would have equally applied to the appeal in that case. In *Rex* v. *Justices of Devon* (1) an appeal was brought under 13 Geo. 3, c. 78, s. 80, against a distress for non-payment of a highway rate. That section, like s. 6 of the Act of Elizabeth, provided that any person aggrieved by any act done by any justice in execution of the Act might appeal to quarter sessions, such person giving notice of appeal within six days after the cause of complaint arose. The Court held, indeed, that a notice of appeal was not too late if given within six days after distress levied; but Lord Ellenborough said, "It is not necessary that he should appeal on the warrant," suggesting that the appellant need not wait till the warrant is executed before giving notice of appeal. In *Ricardo* v. *Maidenhead Local Board* (2) all the judges expressed an opinion that an appeal would lie against a distress warrant for rates under the Public Health Act, 1848, s. 135 of which gave an appeal to a person aggrieved by any order of a justice. It is not contended that s. 7 of 17 Geo. 2, c. 38, gives any right of appeal in the present case. For that section only gives an appeal in case of the execution of the warrant outside the jurisdiction of the justices issuing it.

To the objection that, if an appeal lies against the issue of a warrant before levy, it is strange that no reported case of such an appeal can be found, the answer is that before the Act of 17 Geo. 2 there was no requirement that the appeal should be to the next quarter sessions, and the appeal would probably be deferred till after levy, and consequently the present question would not arise; and after that Act, as the ground of appeal would in almost every case be a matter in respect of which upon the levying of the distress an action of replevin would lie, the parties would naturally prefer to wait until after distress and recover damages.

Cur. adv. vult.

(1) (1813) 1 M. & S. 411.

(2) (1857) 27 L. J. (M.C.) 73.

1899

REG. v. LONDON JUSTICES.

Feb. 10. The judgment of the Court (Lawrance and Channell JJ.) was delivered by

CHANNELL J. In this case Mr. Matthews obtained a rule nisi for a mandamus to the justices of the county of London sitting at the North London Quarter Sessions to hear and determine an appeal which they had refused to hear on the ground that, in their opinion, there was no right of appeal in the case. Cause was shewn against the rule being made absolute before us, and we have now to say whether the rule should be discharged or made absolute. The appeal was against an order of justices directing a distress warrant to issue for recovery of poor-rates and other rates. The appellants alleged that they had not been rated, and that their name, so far as it appeared on the rate-books at all, had been placed there subsequently to the allowance of the rates. No distress had actually been levied, and, that being so, s. 7 of 17 Geo. 2, c. 38, could not be relied on as giving a right to bring the present appeal, as that section gives a right of appeal only to persons aggrieved by a distress. Mr. Matthews, in his argument in support of his rule, admitted that he could not rely on that section (which he contended only gave a right of appeal where the distress was levied outside the county), and he admitted that the only statute he could rely on was 43 Eliz. c. 2, s. 6. He further admitted that he was unable to find any reported case, in which there had been an appeal, successful or unsuccessful, under the 43 Eliz. against the issuing of a distress warrant. In none of the books of practice of quarter sessions (most of which contain lists, purporting to be exhaustive, of all appeals which do lie to quarter sessions) is there any mention of an appeal against a warrant of distress. It seems to us that it would be a very strange thing, if there really is under the statute 43 Eliz. such a right of appeal, that there should be no trace of such a right in the books during the period of nearly three hundred years which have elapsed since the statute was passed. Mr. Matthews' answer to this was that until the Act of 17 Geo. 2 there was no limit of time for the appeal against a rate, and that in all probability appeals were not presented until an effort was made to levy the money, and then the appeal would be against the

warrant, the rate, and all the proceedings together. Further, as to the period since 17 Geo. 2, he pointed out that an action could generally be maintained in all cases in which, according to his contention, an appeal lay against the warrant, and that most people would prefer an action in which they got damages to a mere appeal. There is a good deal of force in this, but we think it hardly accounts for the complete absence of any trace of such an appeal. We think that the explanation is this. The statute of Elizabeth in general terms gives an appeal against any act done by justices. It does not, however, provide any machinery for the making of a rate, or for the time or manner of any appeal. Many years seem to have elapsed before any definite course of procedure was made obligatory by the Legislature. Ultimately—when, no doubt, great diversity in practice had arisen—the statutes of 17 Geo. 2, c. 3 and c. 38, were passed, which do provide some machinery both for the making of rates and for appeals. From that time other Acts of Parliament have from time to time been passed as to the mode of making rates and other similar matters. The result is that, although the statute of Elizabeth remains unrepealed and is the foundation of the law of rating, its general provisions have been suspended by the particular provisions of subsequent legislation. Just as the manner of making a rate which was left entirely undefined in the statute of Elizabeth has been defined by subsequent legislation, so the time and manner of making the appeals, which in general terms were authorized by the statute of Elizabeth, have been defined, and at the present time the right of appeal given by the statute of Elizabeth exists only in the way defined by subsequent legislation. The mode of appealing against a rate is well defined, and need not be mentioned. The mode of appealing against the act of justices in authorizing the money to be levied by distress is by appealing under s. 7 of 17 Geo. 2, c. 38, against the distress. It has been suggested that that section does not cover the whole ground, as it only gives a right of appeal where the distress is outside the place of assessment, and that it presupposes the existence of a right of appeal where the distress is within the place of assessment, and that that appeal must be

1899

REG. v. LONDON JUSTICES.

Channell J.

under 43 Eliz. We do not think that is so. Sect. 7 refers to distress (1.) in the place of assessment, (2.) outside that place but within the same county or precinct, (3.) outside the county, and goes on to say that any person "aggrieved by such distress as aforesaid" may appeal. We think that means "aggrieved by any such distress as aforesaid," and is not confined to "such distress as last aforesaid." There is, therefore, an appeal under this section whenever a distress is levied either in the place of assessment or elsewhere; but of course there is no appeal under it against the mere act of issuing the warrant unless it is followed up by a distress. This enactment appears to us to define the mode of appealing against the distress warrant, and to prevent an appeal until there has been a distress. We were referred to a case of *Rex* v. *Justices of Devon* (1) as shewing that where an appeal was given against an act of justices (as in the Highway Act (13 Geo. 3, c. 78), which was the matter to be considered in that case), the appeal might be against the warrant before the distress. The case itself does not shew that. Lord Ellenborough's judgment seems to treat it as possible; but what he held was, that there was no real grievance until the distress; consequently that an appeal within six days after the distress, though more than six days after the warrant, was within six days after the cause of complaint; and Lord Ellenborough points out that, although a warrant issues, there may never be a levy, and therefore no real grievance. That case does not really help the appellant in this case. The case of *Reg.* v. *Justices of Kent* (2) was also quoted. That was an appeal under 17 Geo. 2, c. 38, s. 7; and it only decided that there could be no appeal under that section on grounds applicable to an appeal against the rate. The decision was not that no appeal lay under that section where the distress was in the place of assessment, and it does not seem to us that either judge thought that was so. We think we cannot hold that there is now an appeal under 43 Eliz. against a justice issuing a warrant to levy a rate except under the conditions and in the manner provided for by subsequent statutes—that is, after the distress has been levied. This seems entirely in accordance with all recorded practice.

(1) 1 M. & S. 411.

(2) 16 L. T. (N.S.) 672.

1899

REG. v. LONDON JUSTICES.

Channell J.

In the present case the warrant was issued to levy a general district rate and sewers rate, as well as a poor-rate; but no argument was addressed to us shewing any special right to appeal as to those rates, and it seems that they are rates leviable by statute under one warrant, which if necessary is to be treated as if there were separate warrants, and which also are subject, by statute 18 & 19 Vict. c. 120, s. 161, amongst other things, to the same right of appeal as in the case of poor-rate. The inclusion of those rates, therefore, does not alter the matter.

Mr. Matthews, in arguing in support of the rule, suggested that the facts of the present case shewed how desirable it was that there should be an appeal. That may be so; but as an appeal to quarter sessions is entirely statutory, it has little if any bearing on the question we have to decide. What we hold simply is that the appeal is premature before levy, and, having regard to the facts stated in the affidavits in this case, it is unlikely that if those facts cannot be altered there ever will be any levy on this warrant. If those facts are true, there was no jurisdiction whatever to issue the warrant, and all concerned in the levy (except, perhaps, the subordinate officers) will be liable to an action if they act on it. In the result we come to the conclusion that the quarter sessions were right in refusing to hear this appeal, and the rule for a mandamus should be discharged.

Rule discharged.

Solicitors for prosecutor: *H. C. Barker & Son.*
Solicitors for overseers: *J. C. & W. Isaacson.*

J. F. C.

C. A.
1899
Feb. 20.

[IN THE COURT OF APPEAL.]

In the Matter of an Arbitration between THE GUARDIANS OF THE ROCHDALE UNION and THE GUARDIANS OF THE HASLINGDEN UNION.

Local Government—Transfer of Part of one Union to another Union—Adjustment of Property and Liabilities—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 68.

By an order under the Local Government Acts, 1888 and 1894, part of a township within the area of a union was detached from it and transferred to another union. On a claim by the union from which the transfer had been made for an adjustment, under s. 68 of the Local Government Act, 1894, of the property, debts, and liabilities affected by the transfer:—

Held, that any such adjustment must be made between the two unions, and not between the union from which the transfer had been made and the area transferred:

Held, also, that any consideration which bore on the question whether, and to what extent, the union from which the area had been taken had been injured financially by the change, would be properly taken into consideration in making an adjustment.

Judgment of the Queen's Bench Division, [1898] 2 Q. B. 206, affirmed.

Appeal from a judgment of a Divisional Court, reported [1898] 2 Q. B. 206, on a case stated by an arbitrator.

The arbitration arose out of a claim, under s. 68 of the Local Government Act, 1894, by the Rochdale Union against the Haslingden Union, for the adjustment of property, debts, and liabilities of the first-named union, alleged to be affected by reason of the detachment of a part of that union and its inclusion in the Haslingden Union. The facts, which are fully stated in the report of the case below, were shortly these. Previously to 1894 the township of Spotland was within the Rochdale Union, and the township of Newchurch was within the Haslingden Union. By an order of the county council of the county of Lancaster dated June 28, 1894, a portion of the township of Spotland was, in pursuance of the Local Government Acts, 1888 and 1894, amalgamated with a portion of the township of Newchurch into one township by the name of the

township of Bacup. By an order of the same date made by the proper authority, the portion of the township of Spotland which had become part of the new township of Bacup was detached from the Rochdale Union and was included in and became part of the Haslingden Union. The two orders were confirmed by the Local Government Board. At the hearing before the arbitrator it was contended for the guardians of the Rochdale Union that an adjustment was required, and that in making it the following matters ought to be taken into consideration :—

(*a.*) The amount of the outstanding debts charged upon the common fund of the Rochdale Union.

(*b.*) The exceptional number of paupers requiring relief in the Rochdale Union by reason of the density of population and the situation of the town of Rochdale.

(*c.*) The comparative absence of pauperism from the transferred portion of the township of Spotland.

(*d.*) The large amount of workhouse accommodation provided by the Rochdale Union.

(*e.*) The unsuitability and unfitness of a great part of the Rochdale workhouse for the purposes for which it was provided.

(*f.*) The loss of all contribution from the transferred portion of the township of Spotland towards the expenses of the guardians of the Rochdale Union.

(*g.*) The increase in the rates leviable in the remainder of the Rochdale Union by reason of the transfer.

The arbitrator was of opinion that none of the matters relied on by the Rochdale guardians were matters for adjustment between the parties, and he accordingly declined to receive evidence as to those matters, and awarded that no adjustment was required, but stated a case for the opinion of the Court.

The Divisional Court decided that adjustment was required, and remitted the case to the arbitrator. (1)

The guardians of the Haslingden Union appealed.

Macmorran, Q.C., and *C. A. Russell, Q.C.*, for the Haslingden Union. The adjustment, if any, under s. 68 should be between

(1) [1898] 2 Q. B. 206.

C. A. 1899

ROCHDALE UNION AND HASLINGDEN UNION, *In re.*

Rochdale Union and the transferred part of Spotland township. The object of the Act was to make parochial and sanitary areas coextensive, and the alteration of the boundaries of unions was only incidental to that purpose. The question of adjustment only affects the area transferred and the union from which it is taken. If this is not so, the result would be that all the parishes of the Haslingden Union would contribute equally to the sum payable on an adjustment, and Spotland, the area principally interested, would only contribute its proportion. This cannot have been intended by the Act. Further, no adjustment is warranted by the Act, which does not mention any claim for compensation. It does not go so far as the Act of 1888, which in s. 32 deals with "a worse financial position" which may arise where county boroughs are formed, and in s. 62 deals with the adjustment of the "financial relations" arising from the separation. The parties to an agreement under s. 68 of the Act of 1894 can only be parties who have something in which they are jointly interested, so that their liabilities inter se can be adjusted, and the section can only apply when there is some such joint interest.

Brynmôr Jones, *Q.C.*, and *A. Glen*, for the Rochdale Union, were not called on.

LORD RUSSELL of KILLOWEN C.J. I think this appeal should be dismissed. I agree substantially with the judgment of my brother Channell, and entirely in the principle involved in it.

The facts are that under the authority of the Local Government Acts, 1888 and 1894, an order was made on June 28, 1894, and by that order, which was subsequently confirmed by the Local Government Board, the respective boundaries of the Rochdale and Haslingden Unions were altered. A portion of the union of Rochdale, as it then stood, consisted of part of the township of Spotland, and this part was amalgamated with a portion of another township by the name of the township of Bacup. That order having been made, the authorities of Rochdale Union claim that it has worked to the pecuniary disadvantage of their union, and they, therefore, claim to have an

adjustment made, as between their union and the Haslingden Union, of their property, debts, and liabilities.

In answer to this claim two objections are raised. The first is that if there is any ground for adjustment, it cannot be for an adjustment between the two unions, but must be for one between the union of Rochdale on the one hand and the separated portion of the township of Spotland on the other hand. The second point is that the case is not one for adjustment upon the true construction of s. 68 of the Local Government Act, 1894.

As to the first point, in my opinion, it is not possible to give effect to it, because in the case in question we are not dealing with the addition to the Haslingden Union, and the separation from the Rochdale Union, of any body that represents a distinct legal unit. It seems to me, looking to the language of the statute and particularly that used in s. 68 which deals with agreements, for the purpose of adjustment, made between the authorities interested, that it is impossible to suppose that it was intended that there should be an adjustment between the fragment of the township of Spotland and the Rochdale Union. If there is to be any adjustment it must be between the two unions.

The second point is whether this is a case for adjustment; and this must depend on the true construction of ss. 36 and 68. It is important to examine the scope of s. 36, which is the first section of the Act dealing with areas and boundaries. It provides that for the purpose of carrying the Act into effect county councils are forthwith to take into consideration the case, among others, of "every parish which at the passing of this Act is situate partly within and partly without a sanitary district." Then sub-s. 6 provides that where the alteration of a poor law union seems expedient by reason of any of the provisions of the Act, the county council may provide for such alteration. The county council have acted under these provisions, and have made the transfer in question, which has been confirmed by the Local Government Board. The next step is to consider what provisions the Legislature has made in the same statute for dealing with the consequences involved in carrying out the

C. A. 1899

ROCHDALE UNION AND HASLINGDEN UNION, *In re.*

Lord Russell C.J.

provisions of s. 36. It is conceded by counsel on both sides that under that section there are a number of cases which give rise to a claim for adjustment; but it is said that the case of a transfer from one union to another is not one of them. The difficulty in accepting this view is that s. 36 relates, as I have stated, to the alteration of the boundaries of poor law unions, and that when we come to s. 68, which deals with the adjustment of property and liabilities, it applies just as strongly to the case of an alteration of union boundaries, where justice requires that an adjustment should be made, as it does to cases of alteration of other boundaries. In other words, s. 68 applies to all cases that come within s. 36. It is not necessary to say that the language of s. 68 applies in its entirety to every case that comes within s. 36; but it is certainly apt language to cover, amongst others, the case with which we are dealing. The substantial cause of complaint of the Rochdale Union is that there has been taken away from it a portion of the rateable area formerly comprised in it. The taxation of that area was a gain to the union, because the character of the district taken away was such that the union got more out of the district in rates than was required to be expended on that portion of the union for its poor. It is said that Haslingden Union has got the benefit of this, and that an adjustment ought to take place; and, in my view, that contention is right.

I do not think it is necessary to go into the particular heads which were dealt with before the arbitrator; but one matter for consideration is that on the one hand Rochdale Union has been relieved by no longer having to maintain the poor of the detached portion of Spotland, and on the other the benefit of the rates from that area has been lost. Any consideration which bears on the question whether and to what extent Rochdale Union has been damaged financially by the change would be properly taken into consideration on a question of adjustment.

A. L. SMITH L.J. I am of the same opinion. The argument that there cannot be an adjustment in this case between the two unions appears to me to be unfounded. Sect. 36

indicates the areas and boundaries which may be dealt with by the proper authority, and by sub-s. 6 the boundaries of a poor law union may be altered by order, as was done in the present case. Sect. 68 enacts: "Where any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act," the authorities may make agreements for the purpose. I ask myself whether the words "any order" do not embrace the order of June 28, 1894, the effect of which was to take part of the township of Spotland out of the Rochdale Union and put it in the Haslingden Union. In my judgment the section, by its very terms, applies to the present case. The adjustment referred to in the section is an adjustment rendered necessary on account of an alteration of the boundaries of the union of Rochdale, and the authorities interested are the authorities of the two unions. It is a case of a detriment to one union and an advantage to the other; and, in my opinion, it is a case which comes within s. 68, as it certainly does within s. 36.

COLLINS L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for Rochdale Union: *Bower, Cotton & Bower.*

Solicitors for Haslingden Union: *Robbins, Billings & Co., for T. H. Townsend, Rawtenstall.*

A. M.

C. A.
1899
Feb. 13.

[IN THE COURT OF APPEAL.]

Ex parte MERSEY DOCKS AND HARBOUR BOARD.

Practice—Interpleader—Bailee—Estoppel—Right to set up Jus Tertii—Order LVII., *rr.* 1, 2.

Where wharfingers, with whom goods were stored, had written a letter to a bank, stating that they held the goods to the bank's order, on the faith of which statement the bank advanced money on the goods, and subsequently that bank and another bank claimed the goods adversely to one another :—

Held, on an application by the wharfingers for relief by way of interpleader, that, assuming the before-mentioned letter to constitute an estoppel, nevertheless an interpleader order might be made restraining the claimants from proceeding against the wharfingers in respect of their claims except in respect of any claim which the first-mentioned bank might have upon the letter, and directing the trial of an issue between the two banks on the question to which of them the goods belonged.

Attenborough v. *St. Katharine's Dock Co.*, (1878) 3 C. P. D. 450, dicta in, followed.

APPEAL against an interpleader order made by a judge at chambers as after mentioned.

It appeared that one Nicholls had imported into Liverpool a quantity of tobacco, which was stored in warehouses belonging to the Mersey Docks and Harbour Board. He had pledged the tobacco to the Union Credit Bank to secure advances, and it had been transferred into their name in the books of the board. Subsequently, in some way which was not explained, but it was suggested fraudulently, he procured the retransfer of the tobacco into his own name in the books of the board, and then applied to the North and South Wales Bank for an advance upon it, tendering them a transfer by him of the tobacco. The bank refused to make the advance solely upon the transfer by him. Thereupon Nicholls lodged the transfer of the tobacco with the Mersey Docks and Harbour Board, and, upon October 12, 1898, an official in their employ wrote to the North and South Wales Bank as follows: "The undermentioned produce stored in the following dock warehouses is

now held to your order, which must be given on the printed form provided by the board, subject to the ordinary rates and regulations of the board." Then followed a schedule specifying various parcels of tobacco and the warehouses in which they were respectively stored. On receipt of this letter the North and South Wales Bank made an advance to Nicholls upon the tobacco. The North and South Wales Bank and the Union Credit Bank both laying claim to the tobacco, and the former having brought an action against the Mersey Docks and Harbour Board for wrongful detention, and for damages as for a wrongful conversion, thereof, the board took out an interpleader summons; and Ridley J., upon the hearing before him, made an order that the claimants should be restrained from commencing or prosecuting any proceedings against the Mersey Docks and Harbour Board in respect of their claims, except in respect of special damage, if any, which the North and South Wales Bank might have sustained and be entitled to recover through having acted upon the letter of October 12, 1898, and that the claimants should proceed to the trial of an issue in which the Union Credit Bank should be the plaintiffs and the North and South Wales Bank should be the defendants as to whether the former were entitled to the tobacco as against the latter.

Against this order the North and South Wales Bank appealed.

Pickford, Q.C. (*Maurice Hill* with him), for the appellants. The respondents, the Mersey Docks and Harbour Board, having attorned to the appellants with regard to the tobacco, and the appellants having advanced money on the faith of that attornment, the respondents are estopped from denying the appellants' title to the goods: *Henderson & Co.* v. *Williams* (1), and, that being so, they are not entitled to relief by way of interpleader: *Baker* v. *Bank of Australasia* (2); *Dalton* v. *Midland Ry. Co.* (3) There is no real hardship to persons in the position of the respondents in this being so; because they

(1) [1895] 1 Q. B. 521. (2) (1857) 1 C. B. (N.S.) 515.
(3) (1852) 12 C. B. 458.

C. A. 1899

MERSEY DOCKS AND HARBOUR BOARD, *Ex parte.*

could always protect themselves against fraud, as railway companies now generally do in the case of a transfer of shares, by giving notice of any transfer to the supposed transferor. The respondents are liable to the appellants for the value of the tobaccco by way of estoppel by reason of the letter of October 12, 1898, independently of any question as to the real title to the goods as between the appellants and the Union Credit Bank. The question upon which the issue is directed is not material to the question as to the appellants' claim against the respondents by estoppel. Why should the appellants be compelled to fight an issue with the Union Credit Bank, which may be quite immaterial to their right against the respondents? In any case the order is not properly framed, for it only reserves the appellants' right to claim special damage on the estoppel. That reservation is too small; for the appellants ought to be allowed to claim all such damages as would be recoverable for a conversion of the goods. [He also cited *Meynell* v. *Angell.* (1)]

Carver, Q.C. (*Leslie Scott* with him), for the respondents, the Mersey Docks and Harbour Board. The appellants are fully safeguarded by the terms of the order with regard to any claims they may have by reason of the letter of October 12; but, if there be any doubt as to that, the respondents are quite willing that the word "special" should be erased, or any other alteration made in the terms of the order which the Court may think necessary. But the respondents contend that they ought to have relief by way of interpleader with regard to the conflicting claims to the goods themselves. The principle which may be deduced from the authorities with regard to cases such as this, is that the question as to any right which one of the claimants may have to damages based upon an estoppel should be reserved, but that an issue should be directed to try as between the rival claimants the title to the goods: see *Attenborough* v. *St. Katharine's Dock Co.* (2); *Tanner* v. *European Bank.* (3) The authorities have now established that a bailee in possession of goods which are claimed by the bailor and a

(1) (1862) 32 L. J. (Q. B.) 14. (2) 3 C. P. D. 450.
(3) (1866) L. R. 1 Ex. 261.

third person adversely may set up the jus tertii in interpleader: *Robinson* v. *Jenkins* (1); *Rogers* v. *Lambert*. (2) The justice and convenience of the case is that the question as to the title to the goods should be determined as between the rival claimants. If the appellants succeed on the issue in establishing their title to the goods, then the question upon the estoppel falls to the ground. If the appellants are allowed to proceed with their action against the respondents for detention of the goods, the latter must set up the issue that the appellants are not entitled to the goods, and defend upon the strength of such evidence as they may procure from the Union Credit Bank, though they themselves have no interest in the goods; and if they fail, they will still be exposed to the action on the ground of estoppel. It is a great hardship to an innocent bailee of goods to be placed in this position; and the history of the legislation on the subject shews that the jurisdiction with regard to interpleader has been enlarged beyond that originally exercised by the Court of Chancery for the very purpose of giving relief to persons in such a position.

Pickford, Q.C., in reply. The cases in which it has been held that a bailee may set up the jus tertii in interpleader are not cases where there was an estoppel by reason of an attornment to one of the claimants upon the faith of which he had advanced money. In *Henderson & Co.* v. *Williams* (3) it was laid down that in such a case the attornment makes all the difference. The whole series of decisions which derogate from the principle acted on in *Crawshay* v. *Thornton* (4) contemplate the ordinary case of a bailment and adverse claims by the bailor and a third party. But the position of a person to whom there has been an attornment upon which he has acted is much stronger than that of a bailor. In none of the cases, such as *Attenborough* v. *St. Katharine's Dock Co.* (5), in which relief by way of interpleader has been granted was there really an estoppel. In those cases it was merely a question of the quasi estoppel existing as between a bailor and bailee. It is

(1) (1890) 24 Q. B. D. 275.
(2) [1891] 1 Q. B. 318.
(3) [1895] 1 Q. B. 521, at p. 531.
(4) (1836) 2 My. & Cr. 1.
(5) 3 C. P. D. 450.

C. A. 1899

MERSEY DOCKS AND HARBOUR BOARD, *Ex parte.*

not just to compel the appellants, who have acted on the representation of the respondents, to try an issue with regard to the title to the goods with the other claimant, when their primary claim is against the respondents upon their representation, and the question as to the title to the goods may not be material to them. If the appellants fail on the issue, they must then sue the respondents on the estoppel. The question really is which of the two parties ought to be exposed to the risk of two actions in the matter. It is submitted that in justice the respondents should be, for, if they had not written the letter of October 12, the rival claims to the goods never would have arisen. [He also cited *Farr* v. *Ward* (1); *Biddle* v. *Bond.* (2)]

A. L. SMITH L.J. This is an appeal against an order granting relief by way of interpleader to the Mersey Docks and Harbour Board, and directing the trial of an issue between two banks with regard to the title to certain tobacco which they are both claiming from the board. The latter hold the tobacco merely in the character of wharfingers. It was originally stored with them by a man named Nicholls, who pledged it to the Union Credit Bank to secure moneys advanced by them. By some manipulation, the nature of which is not explained, Nicholls subsequently contrived to get dominion again over the tobacco, and in fraud, as it is suggested, of the Union Credit Bank and the North and South Wales Bank, proceeded to pledge it to the latter bank to secure an advance made by them. Before they made the advance, a communication had been made on the subject to the Mersey Docks and Harbour Board, and the North and South Wales Bank had received from the board the letter of October 12, which has been relied on as constituting an estoppel. For the purposes of the present appeal I will assume that it did constitute an estoppel. It is not necessary to decide whether it did or not, but I will assume that it did. The board being thus in possession of the tobacco, in which they had no interest themselves, and which they merely held in the interest of whomsoever it might

(1) (1837) 2 M. & W. 844. (2) (1865) 6 B. & S. 225.

concern, the two banks each made a claim to it as belonging to them. Thereupon the board asked for relief by way of interpleader, and that the two claimants might fight between themselves the question which of them was in the situation brought about by the action of Nicholls entitled to the property. The application came before my brother Ridley, and, exercising his jurisdiction upon the matter as one of discretion, as I understand, he made the order which is the subject of this appeal. I am of opinion that he was right in so doing.

Is is not necessary to discuss the law as to interpleader in times anterior to the Common Law Procedure Act, 1860, or after the passing of that Act but before the Judicature Act. The matter now depends upon the provisions of Order LVII., and I therefore go straight to that order. Order LVII., r. 1, provides that "relief by way of interpleader may be granted (*a*) where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto." This provision is subject to no limitation, except as provided by rule 2 of the same order, which provides that "the applicant must satisfy the Court or a judge by affidavit or otherwise (*a*) that the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and (*b*) that the applicant does not collude with any of the claimants; and (*c*) that the applicant is willing to pay or transfer the subject-matter into court or dispose of it as the Court or a judge may direct." All the conditions mentioned in rule 2 exist in the present case. It is unnecessary to go through the other rules of the order. Except as mentioned in rule 2, I cannot find any limitation on the power of a judge to grant relief by way of interpleader, except of course that he must be satisfied that under the circumstances of the case it is just and proper that the relief should be granted. The learned judge has exercised his discretion as to the justice and propriety of granting the relief asked for under the circumstances of this case.

It is argued that the judge ought not to have made the order

C. A. 1899

MERSEY DOCKS AND HARBOUR BOARD, *Ex parte.*

A. L. Smith L.J.

by reason of the estoppel which existed as between the North and South Wales Bank and the Mersey Docks and Harbour Board by virtue of the letter of October 12, 1898. Assuming for the purposes of this appeal that there was such an estoppel, does that limit the jurisdiction to grant relief by way of interpleader given by the rule? In my opinion it does not. The conditions specified in Order LVII. being fulfilled, I think the judge clearly had jurisdiction to make the order. It is urged that, even if he had jurisdiction, he ought not as a matter of discretion to have made the order, by reason of the estoppel. Before dealing further with that question I will refer to a case which has been cited as bearing upon it, namely, the case of *Attenborough* v. *St. Katharine's Dock Co.* (1) In that case it appears to have been held that there was no estoppel, but the question now before us was touched upon by Bramwell and Brett L.JJ., and I will quote what was said by the latter in giving judgment. He said: "I confess that I can see no ground for thinking that the plaintiffs"—who had advanced money on dock warrants issued by the defendants—"are entitled, as against the defendants, to any damages save those which are ordinarily recovered in an action for conversion; however, I will assume that they have a valid claim for other damages, and that, by virtue of some relation existing between the present plaintiffs and the present defendants, and arising from either contract or estoppel, they can recover some amount from the defendants which they cannot recover from Lopez. But even assuming the claims for damages to be valid, I cannot agree with the argument that these cases are not within the Interpleader Acts: I think that our decision must depend upon the language of those statutes, and I agree with Lord Justice Bramwell that the facts before us fall exactly within the terms of 1 & 2 Wm. 4, c. 58, s. 1. I do not think that the statutes apply merely where the opposing claims are coextensive; I think that they bear a wider construction. Therefore it seems to me that Field J. had jurisdiction to make the order." And again further on he says: "I confess that in my view, although a defendant in possession of goods may be technically

(1) 3 C. P. D. 450.

estopped from denying the plaintiff's claim to them, yet, if a bonâ fide claim is made to them by a third person, a judge ought to disregard the technical estoppel, and direct an issue under the Interpleader Acts to try the question as to the property between the plaintiff and the claimant." I agree with the view so expressed, and see no reason why the existence of the supposed estoppel should, as a matter of discretion, prevent the judge from granting relief by way of interpleader, which, as I have already said, I think he clearly had jurisdiction to do under the terms of Order LVII. It is argued that to grant such relief under the circumstances is not just. I do not think that is so. There is a dispute between these two banks as to the property in these goods, and a substantial and difficult question has to be fought which depends on what the action of Nicholls in the matter has been. Who primâ facie ought to fight that question? Ought the Mersey Docks and Harbour Board, who hold merely as wharfingers, and who really have no interest in the matter, to fight that question; or ought it not rather to be fought out between the two banks who are respectively asserting a title to the goods? It seems to me that the proper course is to make an order eliminating the Mersey Docks and Harbour Board from this dispute, and leaving it to be fought out by the parties between whom the issue as to the property in the goods really arises. There is this further reason for making the order which was made by the learned judge. If on the trial of the issue directed the North and South Wales Bank prove their title to the goods, then there is an end of the matter. If, on the other hand, the Union Credit Bank succeed in establishing their title to the goods, then will arise the question whether, as the North and South Wales Bank contend, although the goods are in truth not theirs, but the property of the Union Credit Bank, nevertheless they have a claim against the Mersey Docks and Harbour Board by reason of an estoppel arising from the letter of October 12. I think that they ought not to be shut out by the order from asserting any claim they may have on that letter, and therefore we propose to enlarge the terms of the order so as to leave it open to them to do so, if they are

C. A. 1899

MERSEY DOCKS AND HARBOUR BOARD, *Ex parte.*

A. L. Smith L.J.

defeated on the issue. They ought, in my opinion, to be left at liberty to sue the board on that letter for the value of the goods as in the old action of trover and for any other damages which they may claim as having arisen from a conversion of the goods by the board. The exception contained in the order will therefore be varied by making it include any claim which the North and South Wales Bank may have by virtue of the letter of October 12. Subject to this modification I think that the order of the learned judge should be affirmed.

COLLINS L.J. I am of the same opinion. The terms of Order LVII. purport to give an absolute discretion to the Court or a judge to grant relief by way of interpleader, subject to the existence of the conditions mentioned in the order, which do not include any such condition as that suggested in argument by the counsel for the appellants. It therefore appears to have been competent to the judge to exercise his discretion in the matter, and he has exercised it by granting relief. That being so, the question is whether there is any rule of law or practice to prevent our exercising our discretion in the same way. I must confess that I have felt much pressed by the argument of the counsel for the appellants, and, but for the authorities which have been cited, I should have been very much disposed to accede to it. He suggested a clear and intelligible principle—namely, that, where the applicant for relief was not debarred by any special relation between him and one of the claimants from setting up the jus tertii against that claimant, there the case was one for relief by way of interpleader, but, where the applicant was so debarred, he was not entitled to relief. It was argued that in the latter case the claimant ought not to be driven first to incur the expense of fighting an issue between himself and the other claimant, and then, if unsuccessful on that issue, have to bring his action against the applicant. I was disposed to agree that in such a case there would be a reasonable ground for declining to grant relief by way of interpleader. But, on looking at the authorities, and considering the history of the law on the subject of inter-

pleader, and the modification of it which has taken place, I cannot shut my eyes to the fact that eminent judges who have had to deal with these questions have been of opinion that the scheme of legislation has been to remove those restrictions which existed with regard to relief by way of interpleader before the Common Law Procedure Act, and to give a wider jurisdiction to the Court in these cases. I think that in *Attenborough* v. *St. Katharine's Dock Co.* (1) Bramwell and Brett L.JJ., though they did not decide the point, both indicated an opinion that an applicant ought not to be debarred from obtaining relief by way of interpleader, because he might be liable for damages by reason of an estoppel to one of the rival claimants, although the goods were the property of the other claimant. It seems to me that this must have been the view of Bramwell L.J. from the passage on p. 456 of the report, where he says: "it was further contended that the defendants were estopped from denying that the wine is the property of the plaintiffs: but it is clear that in no case is Lopez estopped, and therefore the estoppel cannot operate for the benefit of the defendants: it seems to me a proposition quite incapable of being sustained, that Lopez can recover the value of the wine from the defendants, and that they should at the same time be liable for it to the plaintiffs." Brett L.J., in the passage to which my Lord has referred, deals in terms with the case in which there is an estoppel: and again in the case of *Robinson* v. *Jenkins* (2) he says: "Then it is said that there cannot be an interpleader order to relieve the defendants, because, even supposing that the certificate and transfer represent the shares, and so the defendants have possession of all the documents of title to the shares, possession was given to them under a contract by which they are bound to give the documents back to the plaintiff. That at one time appeared to me a formidable objection, because in this action it is plain that the defendants could not set up the jus tertii. Although that cannot be done in an action, that does not determine the question whether there may not be an interpleader in such a case where an adverse claim is set up. That question seems to be determined

(1) 3 C. P. D. 450. (2) 24 Q. B. D. 275, at p. 278.

C. A. 1899

MERSEY DOCKS AND HARBOUR BOARD, *Ex parte.*

Collins L.J.

by the cases that have been cited. In *Best* v. *Hayes* (1) and *Tanner* v. *European Bank* (2) the point was expressly raised, and decided favourably to the issue of the interpleader." Therefore he distinctly faces the contention that, where there is an estoppel by which the applicant is debarred from setting up the jus tertii, relief by way of interpleader ought not to be granted, and says that, notwithstanding such an estoppel, the judge ought to make an order for an interpleader issue. We have therefore an expression of opinion by those two learned judges in the Court of Appeal that the existence of the estoppel is no bar to relief by way of interpleader.

With regard to the question of discretion, we have the fact that the learned judge has exercised his discretion in favour of the respondents, who are a body of persons precisely of the class which the legislation with regard to interpleader was intended to relieve; and there is also the consideration that on the issue the whole controversy may be determined as between all parties, while, in the event of the appellants being unsuccessful on the issue, any right to damages which they may have against the respondents on the footing that an estoppel was created by the letter of October 12 is by the terms of the order as varied by us fully safeguarded. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for North and South Wales Bank: *T. Cooper & Co., for Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for Mersey Docks and Harbour Board: *Rowcliffes, Rawle & Co., for A. T. Squarey, Liverpool.*

(1) (1863) 1 H. & C. 718. (2) L. R. 1 Ex. 261.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1899
Feb. 14.

TILLING, LIMITED *v.* BLYTHE.

Practice—Receiver—Notice of Application—Defendant not Appearing—Order LXVII., *r.* 4.

Where a defendant has not appeared, and an application is made for the appointment of a receiver, it is not sufficient to file the summons at the central office, but it must be served on the defendant, or leave must be obtained for substituted service.

APPEAL from an order of Ridley J. at chambers discharging an order made on the application of the plaintiffs for the appointment of a receiver.

The action was brought to recover money due for the hire of horses, and judgment was signed for default of appearance. The plaintiffs applied at chambers for an order for the appointment of a receiver. The summons was served in the manner provided by Order LXVII., r. 4, in cases in which no appearance has been entered, by filing it at the central office of the High Court. The learned judge made an order for the appointment of a receiver; but on an officer of the central office pointing out that such a summons should, by the practice of the office, have been served personally, he revoked this order and made that now appealed against.

The plaintiffs appealed.

Morton Smith, for the appellants. There has been no appearance by the defendant, and consequently all proceedings in respect of which personal service is not requisite may be served by filing them at the central office: Order LXVII., r. 4. This is not a case in which personal service is required within rule 5 of the same order "by these rules or otherwise." There is nothing in Order L. (Part II. Receivers) requiring personal service in the case of an application for a receiver, and no trace in the rules of such a practice. Under Order XIX., r. 6, of the rules of 1875, which corresponds with Order LXVII., r. 4, where the defendant did not appear, notice of motion for judgment

C. A. 1899

TILLING, LIMITED v. BLYTHE.

might be filed with the proper officer: *Dymond* v. *Croft* (1); and, under similar circumstances, filing a notice of motion for attachment was held to be sufficient without personal service: *Evans* v. *Noton*. (2)

A. L. SMITH L.J. In this case the defendant did not appear, judgment was obtained, and an order was made for the appointment of a receiver. Subsequently it was brought to the attention of the learned judge by the officers of the court that notice of the application had not been given to the defendant, and he discharged the order. When first these applications for orders for the appointment of receivers were brought before the common law judges in chambers they were granted on ex parte applications; but it was pointed out by Lindley L.J. in *Lucas* v. *Harris* (3) that these ex parte applications ought not to be granted except in cases of emergency. The meaning of that decision is that orders for a receiver should not be made without due notice, so that the defendant may have an opportunity of being present to shew cause why the order should not be made.

It has been said that the rules do not require personal service; but it was pointed out during the argument that Order LXVII., r. 5, contemplates personal service being required otherwise than by the rules. Here the judgment creditor has endeavoured to dispense with personal service by merely filing the summons at the central office, and the defendant would get no notice of the application. This cannot be allowed. They must try to serve the summons on the defendant; and if they fail in serving it, they can then apply on proper materials for an order for substituted service.

I think the order appealed from was right, and that the appeal should be dismissed.

COLLINS L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiffs: *Henry Foskett.*

(1) (1876) 3 Ch. D. 512.
(2) [1893] 1 Ch. 252.
(3) (1886) 18 Q. B. D. 127, at p. 134.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
Jan. 30.

In re LLOYD AND TOOTH.

Landlord and Tenant—Compensation for Improvements—Counter-notice of Claim by Landlord—Arbitration—Award to Landlord of Amount in excess of Tenant's Claim—Enforcement of Award—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 6–9, 22—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.

An outgoing tenant of a farm gave due notice of intention to claim from the lessor compensation for improvements under the Agricultural Holdings (England) Act, 1883, and the lessor gave due notice of intention to counter-claim against the tenant for breaches of covenant. After the expiration of the time for giving notices of claim prescribed by the Act, both parties gave notices of further claims, some of which were in respect of matters not within the Act. Referees and an umpire having been appointed in pursuance of the Act, before the reference proceeded, an agreement in writing was made between the parties by which all matters in difference as stated in the claims and counter-claims were referred to the referees and umpire already appointed under the Act, and it was agreed that all the said matters should be dealt with in one award only of the said referees or umpire. The referees disagreeing, the umpire made an award by which he found that a certain amount was due from the lessor to the tenant, and a larger amount was due from the tenant to the lessor, and awarded that the tenant should pay the balance to the lessor. The amount not being paid:—

Held, that leave might be given to the lessor to enforce the award in the same manner as a judgment or order to the same effect under s. 12 of the Arbitration Act, 1889.

APPEAL against an order made by a judge at chambers as after mentioned.

By indenture dated May 16, 1888, a farm and premises were demised by Mrs. Tooth, the respondent, to one Robert Davies (since deceased) for a year, and so on from year to year, until the demise should be determined by either party giving notice to the other as therein mentioned. By the terms of the deed it was provided that, if any dispute or question should arise between the lessor and the tenant touching the agreement of tenancy or anything therein contained, or the rights, duties or liabilities of either party in connection therewith, the matter in

C. A. 1899

LLOYD AND TOOTH, *In re.*

difference should be referred to arbitration pursuant to the reference clauses in the Agricultural Holdings Act, 1883, and it was further agreed that the demise should not be affected by s. 33 of the Agricultural Holdings Act, 1883, which was thereby excluded except as to arbitration as thereinbefore mentioned. On the death of Davies his interest in the farm vested in Elizabeth Lloyd, the appellant, who continued to occupy the farm on the terms of the before-mentioned deed until the determination of the tenancy by a notice served upon the tenant on May 28, 1896, to quit the farm on November 30, 1896. On September 29, 1896, the tenant gave notice of her intention to make a claim against the lessor in respect of certain unexhausted improvements within the Agricultural Holdings Act, 1883, to the amount of 50*l.* 12*s.* 6*d.* On December 2, 1896, the lessor gave a counter-notice of her intention to make a claim against the tenant for damages for breaches of covenant to the amount of 40*l.* Subsequently, on January 29, 1897, and November 24, 1897, the tenant gave notices of her intention to make further claims for compensation in respect of alleged breaches of covenants in the lease by the lessor, and for certain allowances which she claimed as outgoing tenant under the lease; and the lessor on May 8, 1897, and October 15, 1897, gave notices of her intention to make further claims against the tenant for compensation for breaches of covenant. These last-mentioned notices purported to be given in pursuance of the Agricultural Holdings Act, 1883. The parties not agreeing as to the matters in dispute, they respectively appointed referees in the manner provided for by the Agricultural Holdings Act, 1883, to determine the amount to be paid as between them in regard to their respective claims, and the referees duly appointed an umpire. The arbitrators and umpire sat together for the purposes of the reference; and, as it appeared that some of the subject-matters of the claims were not within the Agricultural Holdings Act, 1883, and that the notices of all but the first claim and counter-claim were given after the time limited by the Act had expired, an agreement was drawn up, before the reference proceeded, and signed by the counsel who appeared for the tenant and the solicitor who appeared for the lessor, by which all matters in

difference between them as set out in the various claims and counter-claims were referred to the referees and umpire already appointed under the Agricultural Holdings Act, 1883, and it was agreed that all the said matters should be dealt with in one award only of the said referees or umpire. The reference then proceeded, and, the referees disagreeing, the umpire made an award by which he awarded that the sum of 137*l.* 6*s.* was due from the lessor to the tenant on the claims made by the latter, 30*l.* 9*s.* 8*d.* of which was in respect of the tenant's claim under the Agricultural Holdings Act, 1883, and that the sum of 392*l.* 18*s.* was due from the tenant to the lessor on her counter-claims; and that the tenant should therefore pay to the lessor the balance of 255*l.* 12*s.* The award set forth particulars of the matters in respect of which it was made with the sum awarded in respect of each matter. The balance awarded to the lessor not being paid, an application was made at chambers on behalf of the lessor for leave to enforce the award in the same manner as a judgment or order to the same effect under s. 12 of the Arbitration Act, 1889. The master granted the application; and on appeal the judge affirmed his decision.

J. Lawson Walton, Q.C., and *S. T. Evans*, for the appellant, the tenant. The claims and counter-claims purported to be made under the Agricultural Holdings Act, 1883, and the intention of the agreement in writing made subsequently to the appointment of the referees and umpire was merely that they should dispose of the matters specified in the claims and counter-claims under that Act without reference to the technical objection that some of the claims and counter-claims were made too late. It was held in *In re Holmes and Formby* (1) that, where in an arbitration under the Agricultural Holdings Act, 1883, a greater sum is awarded to the landlord in respect of breaches of covenant than is awarded to the tenant as compensation for improvements, the landlord cannot recover the balance under the procedure given by the Act. The ground of that decision was that the Act was for the benefit of tenants, and was not intended to give the landlord any right or remedy

(1) [1895] 1 Q. B. 174.

C. A. 1899

LLOYD AND TOOTH, *In re.*

which he had not before; and that it only allowed him in an arbitration under the Act to avail himself of any counter-claim he might have against the tenant by way of reduction of the amount of the compensation payable to the tenant. The landlord is not bound to counter-claim under the Act. He may bring his action against the tenant for breaches of covenant. But, if he elects to counter-claim under the Agricultural Holdings Act, he cannot then hark back to his common law rights, and can only insist on his counter-claim by way of set-off against the tenant's claim. Sect. 22 of the Agricultural Holdings Act, 1883, forbids the removal of a submission or award under the Act into the High Court. The intention of the Act is that all the procedure with regard to references under the Act and the only mode of enforcing the award shall be in the county court. This arbitration was intended by the parties and must be taken to be an arbitration under the Agricultural Holdings Act, 1883; and therefore the provisions of s. 12 of the Arbitration Act, 1889, do not apply to it.

[They also cited *Farquharson* v. *Morgan*. (1)]

C. A. Russell, Q.C., and *E. Honoratus Lloyd*, for the respondent, the lessor, were not called upon.

A. L. SMITH L.J. In this case the tenant on September 29, 1896, made a claim for compensation for unexhausted improvements under the Agricultural Holdings Act, 1883, and on December 2 the lessor made a counter-claim in respect of breaches of covenant by the tenant. The tenant and lessor subsequently made further claims against one another, and the matter went to arbitration in the manner provided for by the Act. While the reference was pending, a question arose as to some of the respective claims not having been made within the time prescribed by the Act, and thereupon an agreement was entered into between the parties, whereby all matters in dispute between them as stated in the claims and counter-claims were referred to the referees and umpire already appointed under the Act. The result of the arbitration was that the tenant made out her claim to a considerable amount,

(1) [1894] 1 Q. B. 552.

and the lessor made out her claim to a larger amount, so that the amount awarded to her exceeded that awarded to the tenant by 255*l.* 12*s.* As I understand the argument, it is contended that under these circumstances the lessor cannot recover the balance so awarded against the tenant in any court. It seems to me that it would be an extraordinary result that, after incurring the expense of an arbitration like this, the lessor should be compelled to embark in fresh litigation, and incur fresh costs for the purpose of enforcing her claims. It would require very strong words in the Act to lead me to the conclusion that this is the effect of it. The case of *In re Holmes and Formby* (1) has been cited to us in support of the argument put forward for the tenant. I do not impeach the correctness of that decision. It is not necessary for me to consider whether it is right or wrong; for it does not appear to me to apply to the present case. What was held there was that, where there was an arbitration under the Agricultural Holdings Act, 1883, between an outgoing tenant and his landlord, and the amount awarded to the landlord exceeded that awarded to the tenant, the landlord could not recover the balance in his favour in the county court. That is not the present case. The lessor is not here seeking to recover anything in the county court. The contention for her is that there has been a submission to arbitration of matters in difference between her and the tenant outside the Act, the result of which has been in her favour to the extent of 255*l.* 12*s.*, and that under those circumstances she ought to be allowed to enforce the award in the same manner as a judgment or order to the same effect under s. 12 of the Arbitration Act, 1889. The master gave her leave to do so, and the judge affirmed his decision. Against this order the tenant appeals. In my opinion the order was rightly made. The section enacts that "an award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect." What is the answer to the lessor's application? Is there anything in the Agricultural Holdings Act, 1883, which prevents the application of s. 12 of the Arbitration Act, 1889, in the present case? I

(1) [1895] 1 Q. B. 174.

C. A. 1899

LLOYD AND TOOTH, *In re.*

A. L. Smith L.J.

cannot find anything. It was suggested that s. 22 of the Agricultural Holdings Act has that effect. But the meaning of that section is merely that a submission or award under the Act shall not be brought up into the High Court to be quashed, but an award under the Act shall be conclusive except as therein provided. But there is no question here of removing a submission or award under the Act into the High Court. What is asked for is leave to enforce the award in favour of the lessor as a judgment or order to the same effect. For these reasons I think that the appeal should be dismissed.

CHITTY L.J. I agree. Pending the proceedings before the referees and umpire, a difficulty was raised by reason of the fact that some of the claims which had been made were outside the Act and some had been made too late; and thereupon the parties came to an agreement which constitutes a submission, namely, that the claims and counter-claims which had been made by the tenant and lessor respectively should be referred to the referees and umpire who had already been appointed under the Act. The referees disagreed, and the umpire thereupon made the award to which the order appealed against refers. There is nothing in the Agricultural Holdings Act which precludes a landlord, where he has a claim which overtops that made by the tenant, from proceeding to enforce that claim in the usual way: for instance, he may bring an action for it. In the present case, as there was a submission which dealt with some matters outside the Agricultural Holdings Act, the award comes within s. 12 of the Arbitration Act, 1889. The question, whether the decision in *In re Holmes and Formby* (1), which has been cited to us, was correct, does not seem to me to arise. It is unnecessary to say whether that decision was right or wrong. I need not go through the provisions of the Agricultural Holdings Act, 1883. I agree with the view taken by my Lord of s. 22. It merely prevents a submission or award under the Act from being questioned in the way pointed out in the section, and s. 23 provides that in certain cases there shall be an appeal against the award to the

(1) [1895] 1 Q. B. 174.

county court. I see nothing in the Act to take away the jurisdiction of the High Court under the Arbitration Act, 1889, under such circumstances as existed in the present case.

COLLINS L.J. I am of the same opinion. The case of *In re Holmes and Formby* (1) has no bearing on the present case, and it is unnecessary therefore to consider whether it was rightly decided or not. It only goes to the question whether a landlord can recover in the county court a balance awarded in his favour in an arbitration under the Agricultural Holdings Act, and therefore does not avail the tenant in the present case. The tenant in this case cannot succeed unless she can find within the ambit of the Agricultural Holdings Act, 1883, some prohibition which prevents the parties from agreeing between themselves to refer matters in difference as was done in the present case. We have here a submission and an award thereupon outside the Agricultural Holdings Act, 1883, and I can see nothing in the Act to prohibit such a submission being made, and such an award being given under it. I could understand that, if it could be made out that the submission must be read as confined to matters coming within the Agricultural Holdings Act, 1883, and then it could be shewn that the award gave more than the Act allowed, there would be an excess of jurisdiction, and the award would be bad. But on the terms of the submission in this case I do not think any such point can possibly be sustained. It appears to me that there was here a perfectly valid submission outside the Act.

Appeal dismissed.

Solicitors for appellant: *Simpson & Co., for Kelly, Keene & Co., Mold.*

Solicitors for respondent: *Preston, Stow & Preston.*

(1) [1895] 1 Q. B. 174.

E. L.

C. A.
1899
Feb. 10, 11.

[IN THE COURT OF APPEAL.]

In re FRANCES HANDFORD & CO. *Ex parte* FRANCES HANDFORD.

Bankruptcy — Act of Bankruptcy — Bankruptcy Notice — Married Woman trading separately from Husband in Firm Name—Action against Firm— Order XLVIII. *a, rr.* 5, 8, 11.

A receiving order cannot be made against a married woman trading separately from her husband under a firm name on the ground of non-compliance with a bankruptcy notice founded upon a judgment obtained against her in the firm name.

THIS was an appeal by the debtor from a receiving order made by one of the registrars. The debtor was a married woman who carried on business at 42 & 44 James Street, Westminster, under the style of "Frances Handford & Co." The premises were taken in her name, and she opened a banking account in her own name. She appointed her husband, who had previously carried on the business on the same premises and who was now an undischarged bankrupt, manager of the business, and authorized him to sign cheques on the bank "per-proc."

On October 6, 1898, Messrs. Moore Brothers commenced an action against Frances Handford & Co. for the price of goods supplied by them to the firm; and on October 25, 1898, they signed judgment against the firm under Order XIV. for 52*l.* 4*s.* 10*d.* An appearance had been entered to the action by the debtor in the name of "Frances Handford, trading as Frances Handford & Co.," but she did not appear upon the proceedings under Order XIV. On December 7, 1898, Messrs. Moore presented a bankruptcy petition against Frances Handford & Co., grounded upon the non-compliance with a bankruptcy notice issued against the firm in respect of the judgment debt. Upon the hearing of the petition Messrs. Moore discovered for the first time that the debtor was a married woman. The registrar came to the conclusion upon the evidence that the debtor was trading separately from

her husband, and held that, although she could not have been made bankrupt upon a judgment obtained against her in her own name in the form prescribed in *Scott* v. *Morley* (1), she was estopped, by having allowed judgment to go against her by default in the firm name, from opposing the petition on the ground that the judgment was not in the right form. He therefore made a receiving order.

F. Cooper Willis, for the debtor. First, the judgment against Frances Handford & Co. was wrong in form. It ought to have been in the form in *Scott* v. *Morley* (1), which is not a personal judgment for payment by the married woman, but a judgment for payment out of her separate estate. Upon a judgment in that form it is settled that a bankruptcy notice cannot be issued: *In re Hannah Lynes, Ex parte Lester & Co.* (2); *In re Hewett, Ex parte Levene.* (3) Here the judgment ought to have been against the debtor in her own name, trading as Frances Handford & Co. The act of bankruptcy, which consists in non-compliance with a bankruptcy notice, cannot be made available against a married woman, although there are other acts of bankruptcy which are available against her. The right to take proceedings against a firm in the firm name under Order XLVIII. *a* does not of necessity entitle the plaintiff to judgment against the firm when he has ascertained, or could have ascertained, that the only member of the firm is a married woman.

Secondly, upon the evidence, the debtor was not trading separately from her husband.

[LINDLEY M.R. We will hear the point of law first.]

Hansell, for Messrs. Moore Brothers. The debtor cannot rely upon *Scott* v. *Morley* (1), because under Order XLVIII. *a* Messrs. Moore Brothers were entitled to get judgment against the firm. Rule 11 of that order makes any person carrying on business in a firm name liable to be sued in that name, and provides that the rules as to proceedings against firms shall

(1) (1887) 20 Q. B. D. 120. (2) [1893] 2 Q. B. 113.
(3) [1895] 1 Q. B. 328.

C. A. 1899

FRANCES HANDFORD & Co., *In re.* FRANCES HANDFORD, *Ex parte.*

apply. Rule 5 provides that where persons are sued in the name of their firm they shall appear individually, but that all subsequent proceedings shall continue in the name of the firm. That shews that the judgment obtained in this case is in the proper form. Then rule 8 shews what execution may issue upon a judgment against the firm. The debtor enters an appearance to the action without disclosing the fact that she is a married woman, and that fact is discovered for the first time upon the hearing of the bankruptcy petition. If she takes the advantage of trading under a firm name she must submit to the consequences of Order XLVIII. *a*. Then, everything is regular, and no objection can be taken to the bankruptcy notice. This is not like the case of an infant or a lunatic, because a married woman is not incapacitated from being made a bankrupt: see Married Women's Property Act, 1882, s. 1, sub-s. 5. The debtor is estopped by her conduct from objecting to the form of the judgment on the ground that she is a married woman: *Alliance Deposit and Investment Co.* v. *Gardiner* (1); *Poole* v. *Canning* (2); *Dillon* v. *Cunningham.* (3)

LINDLEY M.R. This case raises a new and interesting point. The debtor is a married woman trading under the name or firm of Frances Handford & Co. Her husband was in trouble, and I shall assume for the purposes of this judgment that she carried on business separately from her husband within the legal meaning of those words. She appointed him her attorney to carry on the business in her name, and she gave him power to sign cheques "per-proc." That was, no doubt, a cloak to keep off creditors, and I will assume that she was trading separately from him under the name of Frances Handford & Co. Some persons supplied the firm with goods in the ordinary way of business, and also, I think, in the ordinary way of business they did not take the trouble to find out who were the persons constituting the firm with which they were dealing. The persons who supplied these goods

(1) (1898) 105 L. T. (Journal) p. 224. (2) (1866) L. R. 2 C. P. 241.
(3) (1872) L. R. 8 Ex. 23.

issued a writ under Order XLVIII. *a* against the firm for the price of the goods. The debtor entered an appearance under her own name, trading as Frances Handford & Co. The plaintiffs proceeded quite regularly under Order XIV., and obtained judgment against Frances Handford & Co. What is the consequence of that? Upon that judgment they have issued a bankruptcy notice, and seek to have the debtor made bankrupt. The view of the registrar is that she was estopped, by having allowed judgment in the name of the firm to go against her by default, from saying that that was not a good personal judgment against her. Upon the assumption on which I am proceeding, that this married woman was trading separately from her husband, it is plain that under some circumstances she was liable to be adjudicated a bankrupt under s. 1, sub-s. 5, of the Married Women's Property Act, 1882. That section provides that "Every woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a feme sole." The question is, what is the legal effect of that? It has been decided that upon a judgment against a married woman in the form settled in *Scott* v. *Morley* (1) she cannot be made a bankrupt because there is no personal judgment on her to pay. That form provides as follows: "It is adjudged that the plaintiff do recover £—— and costs (to be taxed) against the defendant (the married woman) such sum and costs to be payable out of her separate property as hereinafter mentioned and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction." Where a judgment has been obtained in that form, which is the proper form of judgment against a married woman, it has been decided more than once that a married woman, though she may be made bankrupt for other causes, is not liable to be made a bankrupt upon a bankruptcy notice founded on that judgment. That brings us

(1) 20 Q. B. D. 120.

C. A. 1899

FRANCES HANDFORD & Co., *In re.* FRANCES HANDFORD, *Ex parte.*

Lindley M.R.

back to the question, what is the legal effect of a judgment against a married woman in the name of the firm under which she is trading? Looking at Order XLVIII. *a*, r. 11, coupled with rules 4, 5, and 8, I think it is not difficult to see what it is. The effect is that that form of judgment conceals the truth, but does not alter it. When you have a rule which enables you for the sake of convenience to bring an action and to obtain judgment against a firm, you are in truth bringing an action against the persons who constitute the firm, and the judgment is really a judgment against the individuals. That is all that the rule means. Whether, in enforcing that judgment in a case where the firm consists of a married woman, you shall issue the ordinary fi. fa., or a special fi. fa. in the form prescribed in *Scott* v. *Morley* (1), I must leave the creditors to determine. I cannot think that the judgment has any effect except as against her separate estate. In my opinion, therefore, a married woman cannot be made a bankrupt upon a judgment in this form. The appeal will be allowed and the receiving order rescinded; but there will be no costs.

RIGBY L.J. concurred.

VAUGHAN WILLIAMS L.J. I also agree with all the reasons which have been given. I am clear that the receiving order ought not to have been made in this case, but I want to add, speaking for myself, that the proceeding by bankruptcy notice, which by the present Bankruptcy Act is substituted for the former proceeding by way of debtor's summons, which had the same object, is a bankruptcy proceeding, and, although you may on filing the petition be allowed to use for convenience the collective name or the trade name as the name in which the proceeding shall be instituted, it is perfectly plain that in bankruptcy you must drop the use of that name, and take care that your proceedings are personally against the person whom you seek to make bankrupt. The result is ultimately that the adjudication is an adjudication against the individual. Whether the bankruptcy proceeding against a married woman takes the form of a debtor's summons or of a bankruptcy notice, there

(1) 20 Q. B. D. 120.

will be no act of bankruptcy by non-compliance if the debtor by such proceeding is called on to do something more than she personally is at law bound to do. The fact that you have obtained judgment against her in the name of the firm does not alter the rights of the parties.

C. A. 1899

FRANCES HANDFORD & Co., *In re.*

FRANCES HANDFORD, *Ex parte.*

Appeal allowed.

Solicitors: *Trass & Enever; Burton, Yeates & Hart, for Edge & Ellison, Birmingham.*

H. B. H.

THE QUEEN *v.* JUSTICES OF MANCHESTER.

1899 *Feb.* 13.

Licensing Acts—Confirmation of New Licence—Excess of Jurisdiction—Certiorari.

The confirming authority whose confirmation is, under the provisions of the Licensing Acts, necessary to the validity of certain classes of new licences, sit as a court, and therefore, if a licence granted to a person not qualified by law to hold it or in other respects granted without jurisdiction is confirmed by them, a writ of certiorari will lie to bring it up to be quashed.

Reg. v. *Sharman*, [1898] 1 Q. B. 578, distinguished.

RULES for certiorari and mandamus to licensing justices.

At the general annual licensing meeting for the city of Manchester held on August 25, 1898, application was made by John Robinson for the grant of a new licence to sell beer to be consumed on the premises at 60, Cannon Street, Manchester, at which place the applicant had for some time carried on the business of a restaurant keeper. The application was opposed. It was proved that the applicant was the tenant and occupier of the premises, and that he was personally present there managing and conducting the business during the whole time that the premises were open, from 8 A.M. to 8 P.M., and that he had his meals there. But it was admitted that neither he nor any other person slept upon the premises, which during the night were closed and uninhabited. The licensing committee granted the licence. Opposition to the licence was renewed before the confirming authority. The justices had their attention directed to s. 1 of the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), which

1899

REG. v. MANCHESTER JUSTICES.

provides that "No licence to sell beer . . . . shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed"; but they were of opinion that sleeping upon the premises was not an essential element of residence, nor a necessary part of the definition of a dwelling-house, within the meaning of the section, and that the object of the Legislature in requiring the residence of the licensed person was to secure the good conduct of the house by imposing upon him the duty of personal management and superintendence; and they held that, as the applicant was upon the premises for twelve hours each day and had his meals there, he was virtually resident for the purposes of the Act. They accordingly confirmed the licence. A rule was then obtained, on behalf of the person opposing the grant of the licence, calling on the whole body of the borough justices and on John Robinson to shew cause why a writ of certiorari should not issue to bring up the licence to be quashed, and also a rule for a mandamus to the justices to hold an adjournment of the general annual licensing meeting and hear and determine the application of John Robinson according to law.

Travers Humphreys, for Robinson, shewed cause. Certiorari will not lie to licensing justices, for they sit in an administrative capacity, and not as a court. The matter is concluded by authority: *Reg.* v. *Sharman* (1); *Reg.* v. *Bowman* (2); *Reg.* v. *Cotham.* (3)

[*Avory*, in support of the rules. The distinction between the present case and *Reg.* v. *Sharman* (1) is that there the rule was addressed to the licensing committee; here it is addressed to the whole body of borough justices, who in their character of confirming authority sit as a court. By s. 43 of the Licensing Act, 1872, they have power to award costs inter partes.]

No distinction can be drawn between the licensing committee and the confirming authority. If the grant of a licence by the former is not a judicial act, neither can the confirmation of it by the latter be so. The power to grant costs does not conclude

(1) [1898] 1 Q. B. 578. (2) [1898] 1 Q. B. 663. (3) [1898] 1 Q. B. 802.

the question. Again, the necessity of confirmation is confined to new licences to sell liquor to be consumed on the premises. It would be strange if a certiorari would lie to bring up that particular kind of licence and would not lie to bring up licences of any other kind.

Nor will a mandamus lie merely because the justices may have misconstrued an Act of Parliament. It is not as if they had refused to take the Act into consideration. They have heard and determined, though possibly they may have made a mistake.

In *Reg.* v. *Cotham* (1) Wills J. pointed out that mere misconstruction of a statute is not sufficient ground for a mandamus. Further, the licences which by the Act of 1840 are not to be granted to non-residents are excise licences; that Act has nothing to do with the beerhouse licences or certificates which are granted by justices, and which for the first time were required by the Beerhouse Act, 1869. There is no Act requiring the justices to refuse their certificate to a non-resident. It may be that the applicant for a justices' certificate will, upon such certificate being granted, go into residence before applying for an excise licence. Further, the justices were right in the construction which they put upon the terms "resident" and "dwelling-house" in the Act. Provided the licensed person is on the premises all day, that is enough. The draftsman of the Act cannot have meant that any advantage was to be gained by the licensed person being on the premises at a time when they are not open to the public.

Avory (*Llewellyn Williams* with him), in support of the rules. The contention of the other side is that if the justices choose to take a wrong view of their powers there is no remedy at all, for the only possible remedies are certiorari, mandamus, and special case, and it seems clear that licensing justices cannot state a case. As to the rule for a certiorari, the cases relied upon by the other side are, for the reasons already stated, not authorities to shew that the writ will not lie to a confirming authority. In *Reg.* v. *Bowman* (2) it is true that the licence had been confirmed; but that fact was overlooked, the rule

(1) [1898] 1 Q. B. 802. (2) [1898] 1 Q. B. 663.

1899

REG. v. MANCHESTER JUSTICES.

being addressed, not to the confirming authority, but to the members of the licensing committee by name. Upon the construction of the Act it seems clear that the justices were wrong. A man's residence and dwelling-house is where he sleeps: *Reg.* v. *Allmey*. (1)

But besides the remedy by certiorari there is also, in such a case as the present, a remedy by mandamus. The justices cannot by disregarding the plain language of an Act of Parliament give themselves a jurisdiction which they do not possess. If they grant a licence to a person who is not qualified to hold it, they are acting in excess of their jurisdiction, and a mandamus will lie to them to hear and determine the application for a licence according to law. In *Reg.* v. *De Rutzen* (2) a mandamus was issued to justices who had refused a licence on grounds upon which they were not authorized by law to refuse it. And on the question whether a mandamus will lie, it makes no difference whether the licence has been granted or refused: *Reg.* v. *Cotham*. (3)

LAWRANCE J. I am of opinion that these rules should be made absolute. The statute is imperative that a person who seeks for a licence to sell beer must be the real resident holder and occupier of the premises, and that, according to the decision in *Reg.* v. *Allmey* (1), means that he must sleep there. It is admitted that Mr. Robinson did not do that. Therefore he was not qualified to hold the licence which was granted to him. What the object of the statute was in requiring residence as a qualification is far from clear. But there it is, and we must give effect to it.

CHANNELL J. I am of the same opinion. The first question to be decided is whether Mr. Robinson was under the circumstances of his occupation of these premises a person qualified to hold a licence—whether, that is to say, he was the real resident holder and occupier of the dwelling-house in respect of which he applied to be licensed. For some time I was inclined to think that the words "the real resident occupier" meant that

(1) (1871) 35 J. P. 534. (2) (1875) 1 Q. B. D. 55.
(3) [1898] 1 Q. B. 802.

the licensed person must be the person who, *if any*, was the resident occupier; in other words, that he must not be a mere servant or manager of the occupier. If that were the right construction of the words, Mr. Robinson might come within them; for, assuming that the house was a dwelling-house, there certainly was no one else who was the resident occupier. He resided there as much as anybody. But the case of *Reg.* v. *Allmey* (1) decides that the house must be a dwelling-house in the sense that somebody must sleep there. That case, therefore, assuming it to be good law—and it does not appear that any doubt has ever been thrown upon it—shews that my first impression was wrong, and that no person who does not sleep on the premises is entitled to have a licence to sell beer under the Act of 1840. That being so, the justices in granting their certificate to Mr. Robinson exceeded their jurisdiction. It is true that they considered the question whether he was a person qualified to hold the licence, and they came to the conclusion that he was. But it seems to me to be clear that a tribunal cannot give itself a jurisdiction which it has not got by taking an erroneous view of the law. Under those circumstances it would appear to be a matter of course to bring up the certificate upon certiorari if that particular remedy is applicable. It is obviously the most convenient course; but whether a writ of certiorari will lie in such a case depends upon the question whether the grant of the certificate was in the nature of a judicial proceeding. If the circumstances of this case were on all-fours with those of *Boulter* v. *Kent Justices* (2) and *Reg.* v. *Sharman* (3), we should be bound to hold that it was not. But Mr. Avory has pointed out a material distinction between those cases and the present. In those cases the question arose with reference to the original proceedings before the licensing committee, and the decision in *Boulter* v. *Kent Justices* (2) proceeded upon the ground that before the licensing committee there is no lis and no controversy inter partes. Lord Herschell says (4): "It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all

(1) 35 J. P. 534.
(2) [1897] A. C. 556.
(3) [1898] 1 Q. B. 578.
(4) [1897] A. C. at p. 569.

1899

REG. v. MANCHESTER JUSTICES.

Channell J.

then become 'the other party'? There is in truth no lis, no controversy inter partes, and no decision in favour of one of them and against the other, unless indeed the entire public are regarded as the other party." But in the present case the proceedings which we have to consider are those, not before the licensing committee, but before the confirming authority. And by s. 43 of the Licensing Act, 1872, to which Mr. Avory has referred us, an objector who appears before the confirming authority and opposes the confirmation of a licence is expressly made a party to litigation, and the justices are empowered to award costs against him in the event of his opposition being unsuccessful. It seems to me, therefore, that the proceeding which is the subject of the complaint in the present case is one in respect of which a certiorari may issue, and I think it right that that rule should be made absolute.

As to the other rule for a mandamus, I have felt a very considerable difficulty which has not been altogether removed. If the decision complained of was altogether without jurisdiction, and one which it is right to bring up upon certiorari, I cannot help feeling that a mandamus to rehear the application is practically a mandamus to refuse it. And except in the case of *Reg.* v. *Cotham* (1), I do not know of any case in which a mandamus has been granted under similar circumstances. That case proceeded to a great extent upon the authority of *Reg.* v. *De Rutzen* (2), which to my mind was a wholly different case. As, however, the mandamus is not seriously opposed, I concur in making the rule absolute upon the authority of *Reg.* v. *Cotham.* (1) But for that decision I should have entertained considerable doubt whether, in the event of the rule being seriously opposed, the mandamus ought to go.

Rules absolute for certiorari and mandamus.

Solicitors for objector: *Lloyd George, Roberts & Co., for Batty, Ford & Buckley, Manchester.*

Solicitors for Robinson: *Bower, Cotton & Bower, for J. H. Boardman, Manchester.*

(1) [1898] 1 Q. B. 802. (2) 1 Q. B. D. 55.

J. F. C.

THE QUEEN *v.* LOWNDES AND OTHERS.

1899
Feb. 13.

Vaccination—Conscientious Objection—Requirement of Production of Birth Certificate—Vaccination Act, 1898 (61 & 62 *Vict. c.* 49), *s.* 2.

Upon an application by the parent of an unvaccinated child, whose birth has been registered, for a certificate of conscientious objection under s. 2 of the Vaccination Act, 1898, the justices are entitled to refuse to give such certificate unless and until the applicant produces to them a certificate of the registration of the child's birth.

RULE for a mandamus to justices.

On October 19, 1898, Arthur Bedford, the prosecutor, applied to the respondents, justices for the county of Buckingham, under s. 2 of the Vaccination Act, 1898, for certificates of conscientious objection to vaccination in respect of two of his children, alleged to have been born respectively on August 26, 1894, and March 9, 1898, and presented himself to be sworn in support of his application; but the justices informed him that as a preliminary proceeding they required the children to be identified by the production of certificates of their birth, and they adjourned the hearing of the application until such certificates should be produced. The prosecutor again applied to the respondents on November 2, and again on November 16 he presented himself, together with his wife, for the purpose of proving upon oath the dates of the children's births, but he did not produce birth certificates, and the justices again adjourned the application. The reason of the justices for so requiring the production of certificates of the children's births was to enable them to be more easily identified, and ensure that the description of the children in the certificates of conscientious objection should correspond with their description in the monthly lists of births that are sent to the vaccination officer by the registrar of births and deaths under s. 8 of the Vaccination Act, 1871, which monthly lists, by an order of the Local Government Board dated October 18, 1898, are to constitute the vaccination register of the district. The prosecutor having obtained a rule nisi for a mandamus to the justices to hear the

1899

REG. v. LOWNDES.

application, the justices in reply made an affidavit setting out the above reasons for requiring production of birth certificates.

No counsel appeared to shew cause.

Schultess Young, in support of the rule. The oath of the parents must be better evidence of the identity of the child than the certificate of the registrar of births, for the birth certificate is founded on materials which are not sworn. A birth certificate cannot be obtained without payment, and the justices in requiring production of the birth certificate as a condition precedent to the grant of a certificate of conscientious objection to vaccination are imposing a tax on the applicant which the Vaccination Act does not warrant.

LAWRANCE J. I think this rule should be discharged. It seems to me a most convenient practice to require the certificate of the child's birth to be produced. It earmarks the child. Of course, if the child has not in fact been registered the justices would not refuse a certificate of conscientious objection on that ground. But where it is not disputed that the child has been registered, I think they are justified in requiring the certificate of registration of the birth to be produced.

CHANNELL J. I am of the same opinion. I think the justices are entitled to insist on production of the birth certificate unless good reason is shewn why that certificate should not be produced. If the child is not registered, that would be another matter. The justices required the birth certificate for the purpose of enabling them to make a proper certificate of conscientious objection. For these latter certificates have to be sent to the vaccination officer, and it is necessary that the children to which those certificates of exemption from vaccination refer should be properly identified, in order that the vaccination officer may see that the lists of vaccinated and of exempted children correspond with the lists of births furnished to him by the registrar of births.

Rule discharged.

Solicitor for applicant: *A. Cheverton.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1899
Feb. 8.

THE FIELD STEAMSHIP COMPANY, LIMITED *v.* BURR.

Insurance, Marine—Policy—Insurance on Ship—Perils of the Seas—Consequential Damage, Underwriter's Liability for—Cost of Disposing of Cargo rendered worthless by Sea Peril.

A ship, insured under a time policy on hull and materials, machinery and boilers, against perils of the seas and all other perils, losses, and misfortunes which might come to her hurt, detriment, or damage, was, during the currency of the policy, injured through a collision in the Thames whilst making for London, her port of destination, a hole being knocked in her bottom. Her cargo, cotton seed, through the action of the water and mud which came through the hold, became rotten, offensive, and worthless, and neither the cargo owners nor their underwriters would pay freight or take delivery. After the collision part of the cargo was put into lighters in order to allow the ship to be taken into dry dock, where she was temporarily patched. Subsequently she was towed to the Millwall Dock to discharge the rest of the cargo, and thereupon the sanitary authority of the district ordered her to abate the nuisance caused by the offensive condition of the cotton seed and to remove it. The ship accordingly was taken down the river to Dagenham Pier, and her cargo was there discharged by contractors on to land belonging to them. In an action on the policy by the shipowners to recover from their underwriter the cost of dealing with the cargo between the date of the collision and the date of its arrival at Dagenham, and also the contractors' charges for discharging and disposing of it there:—

Held, that the plaintiffs were not entitled to recover any of such cost or charges.

Judgment of Bigham J., [1898] 1 Q. B. 821, affirmed.

APPEAL from the judgment of Bigham J., reported [1898] 1 Q. B. 821.

The action was brought against an underwriter to recover a partial loss under a time policy on the plaintiffs' ship *Elmfield*.

The policy was on hull and materials, on machinery and boilers, valued at 10,000*l*., and the perils insured against were, amongst others, "of the seas . . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship, &c., or any part thereof."

During the currency of the policy the vessel was carrying a

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

cargo of cotton seed on a voyage from Alexandria to London under a charterparty made by the plaintiffs with Messrs. Barnett Brothers, acting for the charterers. On December 20, 1896, she arrived in the Thames, when, owing to a collision with another vessel, she sustained such serious damage to her hull below the water-line that it became necessary to run her ashore in order to prevent her from sinking in deep water. During the next ten days part of her cargo was put into lighters, and by this means she was sufficiently lightened to enable her to be towed to the Tilbury Dry Dock, where she was temporarily patched. On January 5, 1897, she was towed to Millwall Dock, where it was intended that the remainder of her cargo should be discharged. It was found, however, that by the action of the water and mud, which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive and was a nuisance, and thereupon the sanitary authorities ordered the ship to abate the nuisance and to remove the cotton seed. In the meantime the owners of the cargo had abandoned the cargo to their underwriters, and neither the cargo owners nor their underwriters would pay freight or take delivery, alleging, as the fact was, that the cargo had ceased to be cotton seed and had become worthless.

In these circumstances the plaintiffs made a contract with a firm of Samuel Williams & Sons, who are the owners of a pier at Dagenham, near the mouth of the river, to discharge the cargo and spread it out on some land at a short distance from the pier at a charge of 5*s.* per ton, and so to get rid of it. The ship accordingly left Millwall Dock for Dagenham Pier, and the stuff was there discharged by Samuel Williams & Sons.

All claims against the underwriters on hull were settled, except as to items amounting in the aggregate to 1046*l.* 12*s.* 10*d.* These items may be divided into two classes: (1.) the charge incurred in dealing with the cargo between the date of the casualty and its arrival at Dagenham, amounting to 287*l.* 2*s.* 10*d.*; and (2.) the charges of Messrs. Williams, amounting to 759*l.* 10*s.*, for discharging and disposing of the cargo at Dagenham.

The question was whether the defendant and his co-under-

writers were under any liability to recoup the plaintiffs any, and if so what, part of this expenditure.

The learned judge, from whose judgment the above statement of facts is taken, gave judgment for the defendant. (1)

The plaintiffs appealed.

Jan. 18. *Joseph Walton, Q.C.*, and *Lewis Noad*, for the plaintiffs. There was in this case physical damage to the ship occasioned by a peril of the sea in respect of which the plaintiffs are entitled to recover on the policy. Through a peril of the sea that which had been cargo was turned into a mass of putrid filth, which the cargo owners were entitled to refuse to receive. As long as it remained in the ship, it prevented her from being of any use as a ship, and the removal of it was the first operation necessary to be done by way of restoring her and making her fit for use. The case is substantially the same as if the ship had been sunk in a river with a hole in her, and had thereby become full of mud. Could it be doubted that in that case the expense of removing the mud would be payable by the underwriters? Suppose in such a case the machinery of a steamer had become clogged with mud. Surely that would be damage covered by the policy. The learned judge in the Court below treated the operation of removing the putrid cotton seed as if it had been the ordinary operation of discharging cargo, only rendered more expensive by the circumstances. But it is submitted that that view is fallacious. The cotton seed was no longer cargo. The cargo owners refused to receive it, and the duty of the shipowners to deliver it to them as cargo had ceased. The removal of it did not take place in pursuance of the duty of the shipowners to the cargo owners. What was done here would not have been required but for the accident which occurred to the ship. In any case the plaintiffs are entitled to recover the amount by which the removal of the cotton seed from the ship was rendered more expensive than if it had been discharged as cargo in the ordinary way. The damage to the ship could not have been repaired without removing the cotton seed. Therefore the expense of removing

(1) [1898] 1 Q. B. 821.

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

it was really part of the cost of repairing sea damage to the ship. The case of *Robertson* v. *Ewer* (1), which was relied on by the learned judge below, depends on the principle that, as long as the voyage continues, the shipowner is bound to bear all expenses involved in the carrying out of the adventure; but here the voyage was at an end, and that which was cargo had ceased to be cargo.

[They cited Arnould, 2nd ed. pp. 839, 840; 1 Park on Marine Insurance, 8th ed. p. 115; *The Pomeranian* (2); *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (3); *Ruabon Steamship Co.* v. *London Assurance.* (4)]

Carver, Q.C., and *Scrutton*, for the defendant. The extra expense incurred in unloading the cargo in this case arose to the plaintiffs, not as owners of the ship, but as carriers, and this is an attempt to throw on underwriters on hull losses sustained by the plaintiffs as carriers. Their duty was to deliver the cargo, and the condition of the cargo making this impossible is not a matter which concerns an insurer on hull; for in order to claim against him the plaintiffs must shew that they are damaged as owners of the hull. It cannot affect the liability of such an underwriter that the cargo has deteriorated so that the expenses of discharging are increased, and the carrier cannot recover freight. The underwriter could only be liable for damage to the cargo where it is incurred to prevent damage to the hull, and damage to cargo making it more difficult to discharge is not in itself damage to hull. The analogy arising from the suggested obligation on the underwriter on ship to pay for cleaning away mud brought in by the sea is incorrect, for the necessity for doing this would arise from the accident to the ship; but the cargo is not in the ship by reason of any peril of the sea, though the expense of removing it has been aggravated by such a peril. No question arises as to damage to cargo incurred to prevent damage to hull. Nor is there any question in this case of the increase of the cost of repairing the hull arising from the condition of the cargo. That might raise a different question; but here the

(1) (1786) 1 T. R. 127.
(2) [1895] P. 349.
(3) (1886) 11 App. Cas. 573.
(4) [1898] 1 Q. B. 722.

underwriters have paid for all the damage to the hull direct and consequential. Underwriters on hull are not bound to pay the cost of repairs as such, but to pay the loss measured by the damage done: *Stewart* v. *Steele* (1); *Pitman* v. *Universal Marine Insurance.* (2)

[They cited also *Svendsen* v. *Wallace* (3); *Montoya* v. *London Assurance.* (4)]

Joseph Walton, Q.C., in reply.

1899. Feb. 8. A. L. SMITH L.J. read the following judgment:—The facts of this case will be found in the judgment of my brother Bigham, and the question which arises thereout is whether a shipowner, insured under a policy of marine insurance covering hull and machinery against perils of the sea, is entitled, in the case of damage to hull and machinery by a sea peril, to recover from his underwriters the cost of discharging the cargo, which has become putrid by reason of a sea peril and is rightly refused by the consignee at the port of discharge, in addition to the damage occasioned to the hull and machinery by the sea peril.

I have found from experience in cases of marine insurance that a case, which is in itself tolerably clear, is often obscured by the putting by the learned counsel of numerous instances said to be analogous, and which upon their face are somewhat similar to the case in hand, but are not so when understood. In my opinion, unless the case is concluded by authority, the best and safest way to arrive at a true decision as to what is recoverable under a policy of marine insurance is to ascertain in the first place what constitutes the subject-matter of the insurance, and next against what perils that subject-matter is insured. When this is arrived at, what is covered—that is, what is recoverable under the policy—will be understood.

In this case the subject-matter of the insurance is clear: it is hull and machinery, and nothing else. The peril against which this subject-matter is insured is also clear: it is the

(1) (1842) 5 Scott, N. R. 927.
(2) (1882) 9 Q. B. D. 192.
(3) (1884) 13 Q. B. D. 69; (1885) 10 App. Cas. 404.
(4) (1851) 6 Ex. 451.

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

A. L. Smith L.J.

deterioration occasioned to the hull and machinery by perils of the sea. Having got thus far, it follows that, to constitute a claim upon a marine policy covering hull and machinery against sea perils, the assured must establish a deterioration to the hull and machinery by a sea peril, and this, when established, the underwriter of hull and machinery is liable to make good to the assured. This is the underwriter's sole liability, and so far I apprehend this cannot be disputed. Now what, if the underwriter has paid every farthing's worth of deterioration of the hull and machinery occasioned by the sea peril—for that this is the measure of the shipowner's loss see *Stewart* v. *Steele* (1) and *Pitman* v. *Universal Marine Insurance* (2)—is to take place? What further claim has the shipowner against the underwriter under a policy upon hull and machinery after all this has been made good to him? This is the question in this case. The answer, which seems to me spontaneously to arise, is that the shipowner has no further claim; and this is the judgment of my brother Bigham now under appeal. The above is how this case appears to me to stand unencumbered by hypothetical cases which were put forward in argument. As to authorities, there certainly are none to the contrary, and what authorities there are are in favour of what I am saying, and will be found in Bigham J.'s judgment. Notwithstanding this, it is now argued for the shipowner, who has been paid every farthing's worth of deterioration brought about by the sea peril to the hull and machinery of his ship by the underwriter thereof, that, inasmuch as by the sea peril the cargo became putrid, and in such a state that the consignee at the port of discharge was not bound to accept it, and the shipowner has thereby lost his freight, he can recover from the underwriters of hull and machinery the expenses of discharging this putrid cargo, and it is said that this is so because the discharge of the putrid cargo was made, not in order to deliver it to the consignee, but to enable the repairs to be done to the injured hull and machinery, and that this expense consequently forms part of the deterioration occasioned to the hull and machinery by the sea peril. The validity of this argument when applied to this case I have

(1) 5 Scott, N. R. 927, at p. 948. (2) 9 Q. B. D. 192, at p. 216.

been unable to appreciate, and in my judgment it is wholly unfounded.

Whether the cargo be sound, or partially damaged, or putrid, it has to be discharged at the port of destination by the shipowner, if it is to be got out of the ship at all. With this the underwriter of hull and machinery has nothing to do. Whether the cargo be such that the consignee was bound to receive it or not is in my opinion, as regards the liability of an underwriter upon hull and machinery, wholly immaterial. What has he to do with it? I am not dealing with a case of jettison; that has nothing to do with this case. If loss is occasioned by delay in the discharge of cargo, whether sound, unsound, or putrid, at the port of destination, this is not damage to hull and machinery, and the loss must be covered, if covered at all, by one of those policies which cover losses which are not undertaken by underwriters upon a policy upon hull and machinery, or possibly by a policy upon freight. A delay occasioned by discharging cargo is not, as before stated, a deprivation of the use of the hull and machinery to the owner by reason of an injury to the subject-matter insured, and forms no part of the deterioration to hull and machinery for which an underwriter upon hull and machinery is alone liable, and a fortiori the mere extra expense of getting out the cargo is no part of his liability. Take a case where the hull and machinery is not damaged by a sea peril, but the cargo is. What liability in these circumstances is the underwriter upon hull and machinery under? What has he to do at the port of destination with the cargo or the discharge of it, or who takes it, or where it is taken to, or the time it takes to discharge it, or what the discharge costs the shipowner, or whether it be the shipowner's cargo or some one else's, or whether it be sound or putrid? Surely nothing. An underwriter upon hull and machinery has nothing to do with the cargo on board, even if that cargo belongs to the shipowner himself: see Arnould on Insurance, 2nd ed. p. 267. So, again, take the case where both the hull and machinery and the cargo are damaged by a peril of the sea. What liability in these circumstances is the underwriter upon hull and machinery under after he has made good to the shipowner the whole

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

A. L. Smith L.J.

deterioration to the hull and machinery of his ship by reason of the sea peril? What has he to do with the cargo or its discharge?

Now, take the present case, where the hull and machinery is deteriorated by a sea peril, and where the cargo is so deteriorated by a sea peril as to become putrid and in such a state as to justify the consignee in refusing to receive it. How does this affect the underwriter upon hull and machinery, though it was strenuously argued that it did? The underwriter upon hull and machinery cares nothing, and legitimately cares nothing, as to what becomes of the cargo, whether sound, damaged, or putrid. All this is wholly immaterial to him. All he has to do under his contract is to make good to the assured shipowner the deterioration occasioned to the hull and machinery of his ship by a sea peril, and nothing more. It was suggested in argument, though no authorities were cited to support the suggestions, nor as far as I know do any exist—(1.) that the cost of removing sand or gravel or mud washed into a ship by a sea peril did or might fall upon underwriters of hull and machinery; (2.) that the cost of removing ballast fell or might fall upon the underwriter upon hull and machinery. I give no opinion as to either of these suggestions, but I will say that I am by no means convinced that they are correct, and when they come up for decision, I will endeavour to decide them; it is sufficient to say that neither of these suggested cases is the present case, which relates solely to the cost of removal of a putrid cargo at the port of destination. It was then said that the cost of removing cargo at a port of refuge in order to repair damage to hull and machinery fell upon the underwriter of hull and machinery. This may be so, but I do say that such a case at a port of refuge is certainly not a case of removing cargo at a port of destination, and different considerations obviously arise thereon. It was further argued that the shipowner might at any rate recover the extra if not the whole of the cost of removal occasioned by the cargo being putrid from the underwriter of hull and machinery. Why so? What I have already said in my opinion covers this point. To accentuate this, I will take for an instance the case of a cargo of cement

in bags, solidified by a sea peril so as to become stone, and thus to cost more to discharge than otherwise would be the case. If by the solidification the cement got affixed to the hull or machinery, so that either the hull or machinery became damaged, I can understand the argument that for this damage the underwriter upon hull and machinery might have to pay, but for the mere extra cost of removal of the cargo at the port of destination, with which removal the underwriter upon hull and machinery has nothing to do, in my opinion the underwriter upon hull and machinery is not liable. This cost forms no part of any deterioration to the subject-matter of the insurance—namely, the hull and machinery—any more than damages an assured upon hull and machinery may have to pay the owner of a ship, with whose ship that of the assured has come into collision. I am of opinion that the judgment of Bigham J. is correct, and that this appeal must be dismissed.

CHITTY L.J. read the following judgment:—I am of the same opinion. In the decision of this case the subject-matter of the insurance ought to be kept steadily in view. The thing insured was the ship and machinery. For all damage sustained by the hull and the machinery the underwriters have made full compensation to the plaintiffs. They have thus indemnified the assured against all loss and damage occasioned to the thing assured by the perils of the sea. But the appellants insist that the measure of the indemnity to which they are entitled under the policy is not thereby satisfied. They claim to be recouped the expense they have incurred in getting rid of that which was cargo, but had become a putrid mass, by the action of the sea water on the cotton seed. I think that the true question is—how much has the thing insured been deteriorated by the peril insured against?

In his excellent argument for the appellants, Mr. Walton suggested the case of a ship damaged by sea perils putting into a port of refuge for repairs, and he argued that in such a case, if the cargo had to be removed in order to get at the damaged parts of the ship to execute repairs, the underwriters would be chargeable with the reasonable expense of such removal. This

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

Chitty L.J.

hypothetical case is clearly distinguishable from the present, and for this reason. The ship had arrived at the port of destination on the voyage she was then prosecuting. This is an important element in considering the plaintiffs' claim. Had the cargo arrived undamaged the underwriters on the ship would have been clear of all liability in respect of its discharge from the ship. The cargo would have been taken out of the ship and the ship left free and open for repairing the hull and machinery. Why, then, should the liability of the underwriters be increased by the circumstance that the cargo, which is entirely outside their policy, has ceased to be cargo in specie and become a stinking mass? They are not concerned with the cargo, or with the stuff into which it has been transformed by the action of the sea water. In so far as the ship itself and the machinery have been deteriorated by the action of the rotten cotton seed, the deterioration has been made good by the underwriters. Among the many hypothetical cases suggested during the argument was that of a cargo of cement powder in bags becoming consolidated into a hard mass by the action of the sea water passing through a hole in the ship's bottom. It may well be that, in such a case as that, the underwriters would be liable for the expense of cleaning the inside of the ship from the cement adhering to it, for that could be reasonably regarded as a damage to the structure of the ship. But as regards the expense of clearing away the rest of the cement at the port of destination, that would merely present the question on the appeal in another form. The position taken up by counsel for the respondent seems to me to be sound. They said that the basis of the appellants' claim when examined was the expense sustained by the assured, not as the owners of the structure of the ship, but as the carriers.

The case has been so fully dealt with by Bigham J. and my Lord and in the judgment of Collins L.J., which I have had an opportunity of reading, that I think it unnecessary to pursue the matter further. My conclusion is that the appellants' claim, when properly understood, does not fall within the reasonable limits of the policy on which they sue.

COLLINS L.J. read the following judgment:—I am of the same opinion. It is not necessary to restate the facts. The sole point left for decision is whether the assured on hull and machinery can throw upon the underwriters the expense of discharging at the port of destination a cargo which, having become putrid by the action of the perils of the sea, has lost its identity, and in respect of which, therefore, no freight is payable by the consignee. The mere statement of the point would seem to carry its own answer. It is true that the ship was itself damaged, and likewise the machinery, by the peril which destroyed the cargo; but all this damage has been fully satisfied by the underwriters, and the right of the plaintiffs may, I think, be tested by considering what their position would have been if the sea water had got access to and spoilt the cargo without physical damage to the hull. How can the presence of a putrid cargo in the ship be said to be a damage to the hull? The fabric of the ship is not injured by it. So far as it affects the ship at all it is by interfering with its use until the cargo is removed. This is not damage to hull which is the interest insured, but, as counsel for the defendant pointed out, damage to the shipowner in his business as carrier. Though, in the opinion of some writers, it would be more scientific to regard a ship merely as a freight-carrying instrument, and not as a fabric having a value of its own, and therefore to treat interference with its freight-carrying capacity as a damage to ship, instead of looking only to the physical injury to the fabric: see Lowndes on Insurance, par. 189, 18 and 158; this view has clearly not been adopted in our law. Damage by delay is clearly not damage to ship: ibid. par. 126, citing *De Vaux* v. *Salvador* (1) and *Wilson* v. *Bank of Victoria*. (2) That is the ground on which *Fletcher* v. *Poole* (3), *Eden* v. *Poole* (4), and *Robertson* v. *Ewer* (5) were decided. "Here," says Buller J. in the latter case, "the ship itself was safe; and the Court only looks to the thing itself which is the subject of insurance; and the wages and provisions" (during the period of detention for

(1) (1836) 4 A. & E. 420.
(2) (1867) L. R. 2 Q. B. 203, at p. 212.
(3) Park Ins. 115.
(4) Park Ins. 117.
(5) (1786) 1 T. R. 127.

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

Collins L.J.

repairs of damages caused by sea perils) "are no part of the thing insured." Mr. Walton contended that the principle of those cases only applied when and because these charges are to be borne by the owner in return for his freight, and therefore cannot defeat the right of the plaintiff in this case, as no freight is payable, and he cited passages in Arnould which seem to put those cases on that ground: see Arnould, 5th ed. pp. 755, 783 and 842. But this argument is open to more than one answer. In the first place, the right, or loss of right, to receive freight cannot alter the subject of insurance which is not freight, but ship and machinery only. Secondly, the passages in Arnould rest only on the authority of the above cases, or of those which decide that ordinary expenses, payable by the owner under the contract of affreightment at a port of refuge, are not general average expenses, and none of these involve the proposition that such expenses, whether to be borne by the shipowner or not, would be recoverable on a policy on ship. Lastly, the passages when examined, based as they are on the class of authorities I have mentioned, are, such of them as deal with the claim of owner against underwriters on ship, only explanatory of the fact that the interest affected by such losses is, not the ship itself, but something else—namely, the adventure covered by the contract of affreightment. The others deal with average expenses, and to these such considerations are more directly applicable, but have no relation to the point now in discussion.

I have pointed out that the subject-matter insured cannot vary with or depend upon the right to receive freight. If the expense—more or less—of discharging the cargo is outside the contract of insurance on hull, when the owner retains the right to receive freight, it is equally outside it when he has lost such right. The right or loss of the right is each a possible incident of the contract of affreightment, which is a subject-matter quite outside the ship itself, and is not covered by a policy thereon, though the ship may be a factor in performing it.

The inability to recover for loss incident to delay under a policy on ship is, I think, properly put on the ground taken in the cases I have referred to, but it may also be rested on the

ground on which it was placed by Lord Denman in *De Vaux* v. *Salvador* (1), namely, that the sea peril cannot be regarded as the proximate cause of such a loss. "These losses," says Mr. Lowndes, "result not from the damage but from the delay incident to the damage." Here (on the hypothesis by which I am testing the plaintiffs' case, namely, that of no physical damage to hull) the real sea damage was to the cargo; the incidental consequence is that the ship cannot be used again till the damaged cargo is removed, and is therefore, on the same reasoning, not due to a sea peril as the causa proxima.

I agree, therefore, with Bigham J. that the claim here is analogous to the claim for expenses during detention, which was held in the cases cited to be irrecoverable under a policy on ship. Mr. Walton could cite no authority in support of his proposition that the presence of a putrid cargo in the hull was in itself a damage thereto, but he stated that the presence of sand or mud washed in by a sea peril was in practice treated as such by underwriters, and the cost of removing it paid for under a policy on ship. Of course, such an expense might well be, and no doubt often is, properly recoverable under the sue and labour clause, with which we are not concerned in this case, as the ship was in perfect safety when the expense in question was incurred; and it is often the fact, also, that the practice of underwriters is not in conformity with the strict legal rights under the contract, with which alone we are here concerned. If this practice should be drawn in question hereafter it may become necessary to pronounce upon it; but I am certainly not prepared to hold on the strength of it that the presence in the hull of a cargo, turned into manure by sea damage, is of itself a damage thereto. Being of opinion that the presence of the rotten cargo was not in itself a damage to ship, it is not necessary to decide whether, being a damage to ship, it was to be referred to a peril of the sea as causa proxima. If the case is to be tried by this standard, it might well be distinguishable from the illustration of sand washed in by the direct action of the sea, and it does not seem to me that the point is concluded by *Montoya* v. *London Assurance*. (2)

(1) 4 A. & E. 420.

(2) 6 Ex. 451.

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

Collins L.J.

The ground of that decision was that the tobacco and the hides were to be treated as one entire cargo, injury to a part of which had spread to the whole. Thus the cargo as a whole was injured by the direct action of a peril of the sea. It is obvious that this reasoning does not necessarily cover the case of damage to hull arising out of damage to cargo by the action of the sea. I conclude, therefore, that the presence of the rotten cotton seed in the hull, being otherwise uninjured, was not of itself a damage to hull. But it is said the hull was in fact injured, and the repairs could not be effected without removing the cargo, and the cost of its removal must therefore be part of the expense of the repairs. But all physical damage to hull and machinery has been actually paid for. The cost of repairs is not necessarily the measure of such damage: *Stewart* v. *Steele* (1); *Pitman* v. *Universal Marine Insurance* (2); and I do not think the cost of removing the cargo for the purpose of effecting them can, on the findings of this case, be treated as something payable over and above the sum paid for the physical damage to hull and machinery. But there is a broader ground on which it follows, from what I have already said, that the assured on hull cannot throw upon the underwriters the cost of removing the cargo at the port of destination. The cargo was put on board under the contract of affreightment. All the contingencies which might arise to the cargo were incidents of that contract. If the cargo had arrived in specie freight could have been claimed for it, and the shipowner would have had to bear the expense of delivering it over the ship's rail. The cargo not having arrived in specie, freight cannot be claimed for it, and, whatever the relative rights of the shipowner and the freighter or consignee may be in such case as to the delivery of the cargo, they are just as much incidents of the contract of affreightment as is the right to receive freight when the goods arrive ready to be delivered in specie. The insurer on ship has nothing to do with these matters. They concern the profit or loss on the venture covered by the contract of affreightment, which is quite outside the risk on hull and machinery. I am of the opinion that the

(1) 5 Scott, N. R. 927. (2) 9 Q. B. D. 192.

judgment of Bigham J. was perfectly right, and the appeal must be dismissed.

C. A. 1899

FIELD STEAMSHIP COMPANY v. BURR.

Appeal dismissed.

Solicitor for plaintiffs: *William A. Crump.*
Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1899 *March* 6.

HALL *v.* SNOWDON, HUBBARD & CO.

Practice—Security for Costs of Appeal—Appeal under Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37)—*Order* LVIII., *r.* 15.

The ordinary rule of practice of the Court of Appeal as to ordering security for the costs of an appeal is applicable to appeals under the Workmen's Compensation Act, 1897.

APPLICATION for an order for security for the costs of the appeal.

Notice of appeal was given from the decision of a county court judge upon a claim for compensation under the Workmen's Compensation Act, 1897. The learned judge decided against the claim, and the applicant desired to appeal to the Court of Appeal on a question of law. The respondents thereupon gave notice of this application.

C. Herbert Smith, for the respondents. The claim for compensation was by the infant child of a deceased workman, suing by his next friend. A question was raised whether the wharf where the deceased workman was employed was a "factory" within the meaning of the Act. The county court judge gave judgment for the respondents, who, on representations made to them of the poverty of the plaintiff, did not ask for costs. It is clear that if unsuccessful the plaintiff would not be able to pay the costs of the appeal, and it is submitted that there is nothing to take this case out of the ordinary rule of this Court as to ordering security for the costs of the appeal.

C. A. 1899

HALL v. SNOWDON, HUBBARD & Co.

Bailhache, for the appellant. If an exception to the general practice of the Court is not made in such cases as the present, working men or their dependents will in nearly every case be debarred from appeal unless the case is taken up by a trades union or other society. Under the Employers' Liability Act, 1880, an appeal from a county court lies to the Divisional Court, and no order for security for costs can be made. It is only because the Act of 1897 gives an appeal direct to this Court that the question of security for costs arises. The Court has a discretion as to making such an order, and under the circumstances it is submitted that security will not be ordered. Supposing the applicant is in a position to sue in formâ pauperis, the respondents would get no costs; so that their position would not be better in that case. The poverty of the applicant in such a case as the present is not a special circumstance under Order LVIII., r. 15, on which, standing by itself, the Court will order security for costs of the appeal.

A. L. SMITH L.J. I am of opinion that security for the costs of the appeal in this case must be given. The Legislature has enacted that the tribunal to try all questions of fact arising under the Workmen's Compensation Act, 1897, shall be the county court, in the absence of agreement as to the matter being settled by the other means pointed out by the Act. An appeal has been given to this Court on questions of law. The Legislature has in no way enacted that the ordinary rule of practice of this Court as to security for the costs of an appeal should be abrogated in such cases. The ordinary rule of this Court is that, except in applications for new trials, when the respondent can shew that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made. What is there to take the case before us out of that rule? It is clear that the appellant will be unable to pay to the respondents their costs of the appeal should it be unsuccessful, and in my opinion, in this and similar cases, security should be ordered. If an appellant is in a position to obtain an order for leave to appeal in formâ pauperis he can do so, and no security would

C. A. 1899

HALL v. SNOWDON, HUBBARD & Co.

then be required; but I may point out that in such a case the respondent gets this protection—that an appellant cannot obtain such an order without a certificate from counsel that the case is a proper one for appeal.

COLLINS and ROMER L.JJ. concurred.

Application granted.

Solicitors for appellant: *Riddell, Vaizey & Smith.*
Solicitors for respondents: *Marshall & Pridham.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1899 *Feb.* 21, 22, 24.

In re GEORGE AND THE GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, LIMITED.

Insurance—Burglary and Housebreaking—Loss by Theft—Entry by opening unlocked Shop Door—Breaking open Show-case—"Actual forcible and violent Entry."

A policy of insurance on stock-in-trade recited that the assured was desirous of effecting an insurance "against loss or damage by burglary and housebreaking as hereinafter defined," and the risk insured against was expressed to be loss of the property insured "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." The insured property, which was stated in the policy to be situate on premises No. 78, Strand, was in a shop at that address, the front door of which was shut, but not locked or bolted, and access to the shop could be obtained by turning the handle of the door. In the early morning before business hours, during the temporary absence of a servant of the assured, some person opened the front door, entered the shop, and, breaking open a locked-up compartment or show-case within, which formed a portion of the shop, stole therefrom part of the insured property:—

Held (reversing the judgment of a Divisional Court), that the loss which occurred as above mentioned was not covered by the policy.

APPEAL from the judgment of a Divisional Court (Wills and Kennedy JJ.) upon an award stated in the form of a special case. (1)

(1) [1898] 2 Q. B. 136.

C. A.
1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

On December 24, 1891, a policy was effected by George, the respondent, with the Goldsmiths and General Burglary Insurance Association, Limited, the appellants, by which it was recited that Alfred Augustus George, of 78, Strand, W.C., thereinafter called the assured, was desirous of effecting with the association "an insurance against loss or damage by burglary and housebreaking as hereinafter defined of the property herein described to the amount or respective amounts hereinafter specified." Then followed a description of the property, which was stated to be stock-in-trade situated as above. The policy further recited that there had been made to the association by the assured a proposal and declaration in writing, which was declared to be the basis of the contract. The operative part of the policy was as follows: "Now therefore this policy witnesseth that, if at any time after the date hereof, and during the continuance of this policy, the property above described, or any part thereof, shall be lost by theft following upon actual forcible and violent entry upon the premises, wherein the same is herein stated to be situate, then the association shall pay or make good to the assured such loss to the extent of the value of the property so lost, but not exceeding in the whole the sum or sums of money respectively insured thereon." The policy provided that the insurance thereby made should be subject to the conditions indorsed thereon in like manner as if the same were respectively repeated and incorporated therein. The second condition was as follows: "It is a condition of this policy that the assured shall take due precautions for the safety of the property insured, as if the same were not insured, as regards selection and supervision of employees, securing all doors, windows, and means of entrance, or otherwise." The form of proposal signed by the respondent contained various questions to be answered by the assured. One of those questions was as to the nature of the premises, the answer given being that they were "shop warehouse and dwelling." Another question asked how the premises were protected on basement, ground-floor, and roof lights, the answer being that they were protected by "wood shutters and iron bars and iron plates

inside." The policy continued in force on March 12, 1897, at which time the respondent was the owner of the shop and premises No. 78, Strand, and the stock and property therein contained. In the shop there was a case inclosed by four glass partitions, that is to say by the outer window of the shop, two fixed glass partitions running at right angles to the window, and two folding glass doors with wooden fittings parallel to the shop window. These folding doors were secured at 6.45 P.M. on March 11 by a padlock fixed on to an iron plate on the woodwork of the folding doors and locked. Jewellery forming part of the property insured was inside the case. On March 12, at 8.30 A.M., the front door of the shop was shut, but was neither locked nor bolted, and access to the shop could be gained by turning the handle of the door. On that day, soon after 8.30 A.M., in the temporary absence of the porter, who was moving the shutters of the shop to the rear of the premises, one or more persons opened the front door, entered the shop unobserved, and, having obtained access to the jewellery by forcibly prising off the iron plate to which the padlock was attached, thereupon stole, took, and carried away a quantity of jewellery, which had never been recovered. The respondent claimed the value of the jewellery so stolen from the appellants upon the policy. The matter having been referred to the arbitration of two arbitrators and their umpire in accordance with a provision in the policy, the arbitrators disagreed, and the umpire stated his award in the form of a special case, awarding that, if the Court should be of opinion that the loss of the property was a loss by theft following upon actual forcible and violent entry upon the premises within the meaning of the policy, the appellants should pay to the respondent the sum of 839*l.*

The Divisional Court decided in favour of the respondent.

E. Tindal Atkinson, Q.C., and *Bray, Q.C.* (*C. L. Attenborough* with them), for the appellants. The judgment in the Divisional Court proceeds upon the view that the insurance is against burglary and housebreaking as defined by the criminal law, and really gives no effect to the words of the policy which

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

describe the insurance as being against loss by theft following on "actual forcible and violent entry" upon the premises in which the goods insured are situate. To bring a case within the terms of the policy, there must have been such a degree of force as may be fairly described as violence. It may be difficult to define "violence" for this purpose, but certainly the mere turning of a door-handle, which is the mode by which any person coming to the shop on lawful business would enter, cannot fairly be described as violence. The definition of burglary and housebreaking for the purposes of the criminal law cannot be the test, for, the parties having excluded some cases of burglary and housebreaking, they clearly did not mean to be bound by that test. The second condition indorsed on the policy makes it the duty of the assured to secure doors, windows, and other means of entrance. That condition clearly refers to the locking or barring of doors and windows or other places by which entrance could be effected at night, which indicates that the degree of force contemplated by the policy was such as would overcome the means by which such entrances are so secured.

Joseph Walton, Q.C., and *A. T. Lawrence, Q.C.*, for the respondent. The policy describes the insurance as being against "burglary and housebreaking," though it to some extent cuts down the meaning of these terms. Therefore the general idea of the risk is that it is a risk of burglary or housebreaking, and the question is how far that general idea is restricted by the qualifications imported by the special definition given in the policy. It is submitted that the really important word in that definition is "actual," and that it was intended thereby to exclude cases of burglary and housebreaking in which the entry is only constructively by violence, as where entrance is obtained by a trick, but no force at all is used: see 1 Hale P. C. 553; Archbold's Criminal Pleading, 21st ed. p. 577. Therefore to bring a case within the policy some degree of actual force must be used; but it is impossible for this purpose to discriminate between degrees of force, or measure the amount of force which will or will not amount to violence. If the word "violent" means anything more than

"forcible," it merely means unlawful as being against the will of the owner of the premises. All that it imports is that the entry must be by unlawful force. Here the entry by turning the handle of the door involved a certain amount of force, and it was unlawful; and it amounted to housebreaking: see 1 Hale P. C. 552.

Secondly, assuming that the entry into the shop by turning the door-handle did not amount to a forcible and violent entry within the meaning of the policy, what the thief did in prising off the iron plate of the inner compartment or cupboard, in which the jewellery was contained, amounted to a forcible and violent entry on the premises within the meaning of the policy. It has been held to be burglary where a thief, having obtained entrance to a house without any violence, afterwards breaks an inner door or other part of the house: see Archbold's Criminal Pleading, 21st ed. p. 577, and authorities there cited.

Bray, Q.C., in reply. The policy speaks of "actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." The word "premises" there means the entire premises No. 78, Strand, as is apparent from the use of the term "premises" in other parts of the policy and the proposal for insurance. It is suggested in Foster's Crown Cases, pp. 108, 109, that breaking open a cupboard after entry on premises without violence does not amount to burglary. If the term "forcible entry" is to be considered as used in a technical sense in the policy, the authorities shew that an entry by turning the handle of a door would not be a forcible entry: Com. Dig. Forcible Entry, A. 3.

Cur. adv. vult.

Feb. 24. LORD RUSSELL of KILLOWEN C.J. This is an appeal from the judgment of a Divisional Court by which it was determined that the respondent was entitled to recover a sum of 839*l.*, as being the amount of a loss within the terms of a policy effected by him with the appellants, who are an insurance company. The facts of the case are these. The respondent carried on business as a jeweller and pawnbroker on the premises No. 78, Strand. The entrance to that part of the premises

C. A.
1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

Lord Russell C.J.

which was specially devoted to the jewellery business was by a door of the ordinary character facing the Strand, and the entrance to the pawnshop was by a door towards the back of the premises opening on a side street. On December 24, 1891, the policy was effected, and on March 12, 1897, the policy being then still in force, soon after 8.30 A.M., a thief entered the shop by the front door, which was then closed in the sense that it was put to, but was capable of being opened by turning the door-handle, as the thief did in fact open it. Having so effected an entry, he took advantage of the absence of the respondent's servant, who was engaged in carrying the shutters of the shop to the rear of the premises, to break into a case or show-board, which was partitioned off from the rest of the shop, and made off with a quantity of jewellery which was placed therein. The question is whether the theft so committed was one for the consequences of which the appellants are liable under the policy. The Divisional Court, consisting of Wills and Kennedy JJ., came to the conclusion that the appellants were liable, and we have now to say whether their decision was correct. I wish here to say that in this case no question of principle or of general interest is involved. The question simply is what is the true construction of the contract into which the parties have entered? In order to decide that question, we must endeavour to ascertain the meaning of the parties by the application of the ordinary canons of construction to the language which they have used. If the result should be that persons in the position of the respondent are sufficiently protected by a policy in the terms of the present policy, well and good. If, on the other hand, they are not, the terms of the contract may be altered for the future.

Two propositions were put forward on the part of the respondent. The first was that an entry effected by the exercise of any force, however slight, was sufficient to constitute an entry within the meaning of this policy. It was contended, for instance, that pushing a door open, if it were ajar, or turning the handle of a door, if the door were shut and could be opened in that way, was sufficient force to satisfy the language of the policy. The second proposition was, that, even if that

were not so, and therefore it could not be said that the original entry in this case was effected by force within the meaning of the policy, yet, nevertheless, the language of the policy was satisfied by the fact that the thief, after having entered the shop without force, proceeded to prise off an iron plate to which a locked padlock was attached securing a show-case in which jewellery was placed. We have considered both of these propositions, the first of which was adopted by the Divisional Court, while on the second they expressed no opinion.

The question whether the first of these propositions—and indeed the second also—is correct must be determined by the words of the policy, which I accordingly proceed to examine. The appellants are described in it as "The Goldsmiths and General Burglary Insurance Association, Limited." It recites that the respondent is desirous of effecting with the company "an insurance against loss or damage by burglary and housebreaking, as hereinafter defined, of the property herein described to the amount or respective amounts hereinafter specified." Therefore it is not burglary and housebreaking as defined by the criminal law which is the subject-matter of the insurance, but burglary and housebreaking as the parties have defined them in their contract. Then the policy, following the analogy of the ordinary contract of life insurance, proceeds to make the proposal and declaration on the basis of which the policy was effected part of the contract. I shall have occasion to refer to the terms of the proposal hereafter, but I will proceed first to deal with the operative part of the policy. It provides that, "if, at any time after the date hereof, and during the continuance of this policy, the property above described or any part thereof, shall be lost by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate," then in that case the respondent shall be indemnified. There is nothing else in the body of the policy to which it is necessary to refer. The second condition, which is indorsed on the policy, and incorporated therein, provides that "the assured shall take all due precautions for the safety of the property insured, as if the same were not insured, as regards selection and supervision of employees, securing all doors and

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

Lord Russell C.J.

windows and other means of entrance, or otherwise." I think that condition important with regard to the question I am discussing. The effect of it seems to be that, if the theft had been effected in the night-time, and had been effected because the assured had not taken what a jury might think to be due precautions for the safety of the insured property, the assured could not recover on the policy; and the condition points to the view that what both parties primarily and prominently had in their minds, as the kind of risk against which the assured was to be protected, was the risk of a forcible burglarious entry by night or, if not of such an entry by night, then of a forcible entry in the daytime when, by reason of its not being within business hours, or for some other reason, in default of the usual precautions such a violent entry might be effected. It will be necessary also to refer to the terms of the proposal hereafter, but, for the purpose of construing the policy with regard to the question which I am now discussing, I do not think that they are material. Taking the language of the policy, namely, that the assured is to be protected against loss "by theft following upon actual forcible and violent entry upon the premises," apart from technical considerations, could any one, as a matter of good sense, and, applying its ordinary meaning to ordinary language, suppose that an entry which is effected by turning the handle of the door and walking into the shop is an "actual forcible and violent entry" within the meaning of the policy? It appears to me that such a suggestion is repugnant to good sense. Speaking with unfeigned deference to the learned judges in the Divisional Court, I think that, in the view they took of this case, they erroneously assumed that the policy was intended to protect the assured against burglary and housebreaking in the technical and often subtle senses in which those terms are used in the criminal law, and, taking that view, they failed to give due effect to the important words "as hereinafter defined" by which the words "burglary and housebreaking" in the policy are controlled. I think it is clear that that was the view which they took; for I find Wills J. saying in his judgment, "I think this clause in the policy amounts to an inartistic description of ordinary housebreaking or burglary

with certain qualifications not touching this case"; and Kennedy J. said, "This is a policy expressed to be against loss by burglary and housebreaking, and, for my own part, seeing that those words are fairly well understood, I think the policy cannot be read so as to deprive the assured of protection in the way contended for by the respondents." I repeat that it seems to me that this view of the case ignores the important controlling words, "as hereinafter defined." I think that the parties to this contract did not mean to involve themselves in the subtleties, and there are many such, involved in the criminal law with regard to burglary and housebreaking. I think that they did not intend to use the words which they used in a technical sense at all, but merely meant to cover an entry effected by real violence as contradistinguished from an entry effected by stealth without violence. The argument addressed to us for the respondent took two shapes. The main argument was that the only effect of the words "actual forcible and violent entry," properly considered, was to be found in the construction of the word "actual," and that that was introduced in order to prevent its being said that the policy covered an entry effected by fraud, or in other words a constructive forcible entry. It may be that the word "actual" has that effect, but is that the only effect of that word taken together with the words "forcible and violent" which are used in conjunction with it? It seems to me that the words taken together contemplate the existence of, not a mere technical entry by violence, but an entry by real violence. Let us consider the consequences to which the proposition contended for by the respondent leads. The contention is that the words in question merely negative liability for a constructively forcible entry by fraud, and therefore that any force, however slight, is sufficient to bring the case within the policy. Suppose that the door is closed, and in order to obtain entrance it is necessary to turn the door-handle, that being the natural method by which every one is intended to go in and out of the shop; it is suggested that that is sufficient to constitute a forcible entry within the policy, and the Court cannot enter upon the question, if there be any force, whether a greater or less degree of force was used. But let us

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

Lord Russell C.J.

go a little further, and suppose that the door is ajar and is pushed open for the purpose of effecting an entry. It was argued that that would be sufficient force to constitute an actual forcible and violent entry within this policy. But let us go a little further still, and suppose that the door is ajar, but so far open that a little boy or a lean person could enter without opening it further, but a stout person could not do so. Would it be a forcible entry within the policy, if such a person pushed it fully open and entered, but not so, if a small thief entered without pushing it open? It seems to me that such considerations shew that the line of reasoning on behalf of the respondent is not sound. As I have said, I conceive that the policy was directed to securing the assured against the consequences of an entry effected by real "violence," as the word is commonly understood, in contradistinction to an entry effected by stealth without violence as I think the entry in this case was effected. I think that view of the construction of the policy is strengthened by reference to the second condition indorsed upon it to which I have already alluded. Another view of the meaning of the policy in relation to the question I am discussing was put forward by Mr. Lawrence for the respondent. His argument was this. He adopted the argument of his leader to the effect that the word "actual" was the really important word in the policy. He then proceeded to argue that it would be no unfair construction of the words "forcible and violent" to construe them as meaning "unlawful," and therefore, if there was an unlawful entry, that was sufficient to satisfy the words of the policy. It seems to me that that view cannot be accepted, because it would follow from it that any man who in broad daylight entered a shop, the door being wide open, with the felonious purpose of committing a theft therein, if he got an opportunity of doing so, would have effected an unlawful entry within the meaning of that argument; and therefore that the words of the policy would cover the case of a man who enters a shop without any impediment in his way at all, and, having done so, contrives to distract the attention of the shopman or get him on some pretext to go to another portion of the premises, and then proceeds to commit a theft. I

think no one could say as a matter of good sense that such a case came within a policy which in express terms is confined to cases of "theft following on an actual forcible violent entry on the premises."

Thus far I have been dealing with the first proposition put forward for the respondent, upon which the Divisional Court based their judgment. I now come to the second proposition advanced in argument upon which they expressed no opinion. For the purpose of this question it must be assumed that the entry effected by turning the handle of the outside door was not an actual, forcible, and violent entry upon the premises within the meaning of the policy. It is nevertheless argued that what followed afterwards constituted such an entry. What took place afterwards was this. The thief, who on this hypothesis had entered the shop by stealth and without violence, took advantage of the absence of the respondent's servant, and proceeded to prise off an iron plate to which a locked padlock was attached securing an inclosure bounded by glass which constituted what would be called the shop front or show-board of the shop, and so got possession of a quantity of jewellery with which he made off. The question is whether what he so did can be said to be an entry upon the premises within the meaning of the policy. In my judgment it cannot. In this connection it is necessary to refer again to the language of the policy and proposal. The insurance purports to be an insurance of property on the premises No. 78, Strand, and the entry spoken of by the policy is an entry upon the premises in which the property is situated. The second condition indorsed on the policy, to which I have already referred, shews what is meant by "the premises," for it provides that the assured shall take due precautions for the safety of the property insured by (among other things) securing "all doors and windows and other means of entrance." I think that must mean entrance from the outside into the shop or premises connected therewith. The form of the proposal appears to corroborate this view. The assured was thereby asked to state the nature of the premises; in answer to which inquiry he described them as "shop, warehouse, and dwelling." He was

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re*

Lord Russell C.J.

further asked how they were protected on the basement, ground-floor, and roof lights, and he answered that they were protected by wood shutters, and iron bars, and iron plates inside. For these reasons I come to the conclusion that neither of the two propositions put forward for the respondent can be supported, and that he therefore fails to make out that this was a loss within the true meaning of the policy. The appeal must therefore be allowed and judgment entered for the appellants. I have intentionally avoided dealing with some of the cases suggested during the argument by way of illustration which came very close to the dividing line between a forcible entry and one without force. The operation of drawing the line is in such cases extremely difficult, and it is enough to deal with the facts of the present case and the words of the contract as applicable to them.

A. L. SMITH L.J. read the following judgment:—I agree with the Lord Chief Justice, but, as we are differing from the Queen's Bench Division, I will also deliver a judgment. On December 24, 1891, the respondent effected a policy of insurance with the appellants upon his stock-in-trade of a jeweller and pawnbroker at his shop No. 78, Strand, London. This policy, with the exception of a small matter immaterial to this case, covered and only covered the following risk, namely, loss "by theft following upon actual forcible and violent entry upon the premises," i.e., upon No. 78, Strand. At 8.30 A.M. upon the morning of March 12, 1897, the front door of the shop being then shut, but neither locked nor bolted, a thief entered the shop by turning the handle of the door, and having so entered stole over 800*l.* worth of jewellery.

The first question is, Did this theft follow upon "actual forcible and violent entry upon the premises"? The answer to this certainly appears to me off-hand to be that it did not; for I ask, where is the force and where is the violence? I can see neither, and, unless it be true that every day upon which I enter my house by turning my door-handle I do so by force and violence, it is not true that the thief in the present case entered the respondent's shop by force and violence. The

Queen's Bench Division has held the contrary, and that upon the above facts there was force and violence used within the meaning of the policy; and I must therefore see if there be any context in the policy to make that to be force and violence which otherwise would not be so. It cannot be denied that this policy of insurance is a special bargain between the respondent and the appellants, and, this being so, all I have to decide is what is the true meaning of that bargain according to the words constituting the same. The Divisional Court has embarked upon the inquiry as to what in the criminal law constitutes burglary or housebreaking, but, with all respect for the very learned judges of the Queen's Bench Division, that is not the question; for the parties have in my judgment purposely and advisedly declined to be bound by any such considerations, and have made a special bargain for themselves. They have clearly shewn a determination not to be fettered with any technicalities of the criminal law relating to burglary or housebreaking, and have set forth what it is that is covered by the policy irrespective of that law. Why do I say this? Although burglary and housebreaking will be found mentioned up and down the policy, it is perfectly plain that the policy in express terms states that it is "an insurance against loss or damage"—not arising out of burglary and housebreaking but —"by burglary and housebreaking as hereinafter defined." If the parties intended that the risk covered should be what is known by the law as burglary and housebreaking, why did they not say so? They do nothing of the kind, but on the contrary go to the trouble of expressly defining what they mean, and the risk which is meant to be undertaken, and do not by merely speaking of "burglary and housebreaking" leave the law applicable to these well-known offences to be applied. The parties studiously leave out the prominent word "breaking," and in my opinion advisedly insert the words "lost by theft following upon actual forcible and violent entry," so as to make the risk as unlike the legal definition of burglary or housebreaking as it well can be made. My brother Wills says that the risk covered is nothing more than "an inartistic description of ordinary housebreaking or burglary with certain

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

A. L. Smith L.J.

qualifications"; but with this I do not agree; for I think that the obvious intention of the parties was to cut themselves adrift altogether from the technicalities of the criminal law relating to what is or is not burglary and housebreaking, and to make a special risk unto themselves. My brother Kennedy founds his judgment upon the same principle. I therefore do not intend to be dragged into the investigation, as I have been invited, from Lord Hale downwards as to what constitutes burglary or housebreaking, or stealing from a dwelling-house, according to the law of England; for in my opinion it has nothing to do with the point I have to decide. It is said that the word "violent" has no meaning other than that of the word "forcible" to which it is conjoined in the clause in question, and should therefore be discarded. I do not think so. In my opinion the word "violent" was used to accentuate and give point to the kind of force which was covered by the policy, and to prevent, if possible, it being argued, as argued it has been, that, as the mere act of turning the handle of a door is the exercise of some force, therefore such an act was covered by the policy. It is true the entry must be actual, but also with force and violence. These last words cannot be omitted. For these reasons I do not agree with the Queen's Bench Division upon the first point; for the respondent has failed to prove the exercise of force and violence which is an express term of the policy, and I can find no context in the policy to shew that the words "forcible and violent" do not bear their ordinary meaning.

Now comes the second point, upon which the Queen's Bench Division has given no judgment, and it may be, having decided the first point in favour of the respondent, it thought nothing of the second. It is this. Assuming that the thief actually entered No. 78, Strand without force or violence, which in my judgment he undoubtedly did, still, after he had got in, he broke open with violence the glass show-case in the window which contained the jewellery. That he did this is true, for he forcibly prised off the iron plate of the case at its back to which a padlock was attached. The question is, Is this act covered by the words of the policy, "theft following upon actual forcible

and violent entry upon the premises wherein the same" (the property) "is herein stated to be situate"? It is argued that the glass show-case was forcibly and violently entered, and that the show-case constituted "the premises" upon which the forcible and violent entry was to be made so as to create a liability in the company. But I think it is clearly not so. It is force and violence from without, and not from within, the premises which is covered by the policy. By the proposal which is made the basis of the contract the nature of the premises is declared to be "shop, warehouse, and dwelling-house," i.e., 78, Strand, W.C. Then there is the question in the proposal, "How protected—on basement, ground-floor, and roof lights?" The answer is, "wood shutters and iron bars and iron plates inside." How does this fit in with the glass show-case being the part of the premises into which the actual forcible and violent entry has to be made? Not at all. Again, by the second condition of the policy the assured is to take all precautions as regards securing all doors and windows and other means of entrance or otherwise, and by the third condition the policy is to become void if the assured suffers any change altering the state of the premises in which the property insured is situate. Does this mean, if the assured omits to secure the inside door of the show-case or suffers an alteration of his show-case, the policy is to be void? Clearly not. In my opinion, therefore, this point also fails the respondent. I therefore think this appeal for the reasons above should be allowed.

COLLINS L.J. I so fully agree with the judgments which have been delivered, that but for the fact that we are differing from the judgment of the Divisional Court, I should add nothing. It has been pointed out by the Lord Chief Justice that in this case we have not to deal with any general principle of law, but merely to construe the agreement made by the parties. They have chosen to frame for themselves a definition of burglary and housebreaking for the purposes of their contract, and by that definition their rights in this case must be determined. It is no part of our province to make for the parties a reasonable

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re*.

Collins L.J.

contract; and if, as I think, they have not altogether succeeded in doing so for themselves, we cannot do so for them. I think the vice of the decision of the Divisional Court, if I may say so, is that they sought to make for the parties a contract which should be reasonable from all points of view, and such as the parties, if they had had in their minds all the matters which have been brought before us in argument, might very probably have made for themselves. But I am not called upon to find for the parties that which they have not found for themselves. All I have to do is to look at the words which they have used, and try to give them their plain and common-sense meaning. I find that the cardinal feature in those words is that they provide against force. The insurance is expressed to be against loss "by theft following upon actual forcible and violent entry." The argument for the respondent invites me to leave out and absolutely exclude the natural meaning of the words "forcible and violent," and to say that something which is not forcible or violent is meant. It seems to me that the arguments on both sides are respectively open to considerable difficulties. Neither of them, if pushed to its logical result, would in my judgment make a wholly satisfactory contract; but, as I have said, that is not the point. The question is, to what have the parties agreed? The difficulty in the way of the appellants' argument is that their construction does exclude cases within the legal definition of burglary and housebreaking which, I think, the parties, if they had had their eyes open, would probably have desired to include. It excludes, for instance, cases of real burglary effected by the skilful use of skeleton-keys, or stolen keys, or duplicate keys which have been made by getting a wax impression. Those are cases which the parties probably would not have desired to exclude if they had occurred to their minds. On the other hand, the contention for the respondent is open to equally formidable objections. He says that no more violence is necessary than that which is involved in turning the handle of a door. What then is the meaning of the words "actual forcible and violent entry"? The respondent says that the word "actual" is the key to their meaning, and that the object of using those words was to

exclude cases of merely constructively violent entry, i.e., cases where entry has been obtained by fraud, as distinguished from cases where there has been a really violent entry. His proposition therefore ex hypothesi must be that turning a door-handle is actual violence; for it is essential on this construction that there should be actual violence. It would follow that every customer, who, on a cold day, finding the shop door shut, opens it and enters, makes a violent entry. It was suggested by the respondent by way of meeting this difficulty that the words "forcible and violent" should be construed as meaning "against the will of the owner of the premises." Upon this construction of the words the implied invitation to the customer no doubt gets rid of the difficulty involved in regarding his entry by turning the handle of the door as being violent; but this, on the other hand, involves a departure on the part of the respondent from his main thesis, which upon the words used in the policy is bound to be, and is that the entry must be by actual force and violence, and not by mere constructive violence as defined by the criminal law: for the result of this construction would be that any entry against the will of the owner of the premises, whether effected by any physical violence or not, would be a forcible and violent entry within the definition given by the policy, which, on this hypothesis, instead of falling short of, or rather imposing another term beyond those imposed by, the definition of burglary and housebreaking in the criminal law, would really cover entries which would not be burglary or housebreaking within that definition. Finding it, therefore, impossible on the view presented by either argument to make an entirely reasonable and intelligible contract for the parties, I can only fall back upon the words which they have actually used and try to give effect to them, whether they make such a contract or not. There is another reason why it is impossible for me to speculate as to the intention of the parties apart from the ordinary meaning of the words which they have used. I cannot tell how it would have affected the rate of premium if they had really intended to cover such cases as the present. The contract, as at present framed, appears to me to be inadequate for the protection of the assured, and probably is a much

C. A. 1899

GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, *In re.*

Collins L.J.

more restricted contract than he would have agreed to if he had had his eyes open; but, how can I tell what effect it would have had on the terms of the contract if the respondent had insisted on a larger protection?

With regard to the second question argued, namely, as to the effect of the breaking open of the show-case, I agree with the judgments already given by my Lord and my brother A. L. Smith, and have nothing to add.

Appeal allowed.

Solicitors for appellants: *Attenborough & Son.*
Solicitor for respondent: *Stanley J. Attenborough.*

E. L.

C. A. 1898 *Nov.* 21, 28. 1899 *Jan.* 20.

[IN THE COURT OF APPEAL.]

In re CARL HIRTH. *Ex parte* THE TRUSTEE.

Bankruptcy—Act of Bankruptcy—Fraudulent Conveyance—Assignment to one-man Company—13 *Eliz. c.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*b*) *ss.* 43, 44.

A trader, who was liable under a judgment for the costs of an action, purported to sell his business to a company which he had formed for the purpose in consideration of fully paid-up shares and of the company undertaking to pay his debts. He was the chairman, managing director, and secretary of the company; he or his nominee held substantially the whole of the shares in it, and he had the complete control of it, including the power to draw cheques, which he exercised in his own favour. Within three months of this transaction a bankruptcy petition was presented against him, grounded on his non-compliance with a bankruptcy notice in respect of the costs in question, and a receiving order was made upon it. His liabilities exceeded 2000*l.*, with assets nil. Between the presentation of the petition and the making of the order, a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed. Upon a motion by the trustee in bankruptcy against the liquidator impeaching the validity of the transfer of the business:—

Held, that the transfer was fraudulent and an act of bankruptcy; that the title of the trustee to the business related back to the date of the transfer, and overrode the claims of the creditors of the company in

the winding-up; and that the liquidator was bound to hand over to the trustee the assets representing the business at the time of the transfer.

Decision of Wright J. reversed.

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte*

THIS was a motion by the trustee in bankruptcy of Carl Hirth for a declaration that the transfer by Hirth of his business to a company called Hirth & Co., Limited, under an agreement dated March 7, 1898, was a device to defeat creditors, and fraudulent either under the statute of 13 Eliz. c. 5, or under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*b*), and that the business formed part of the property of the bankrupt; and for an order on Hirth & Co. and the liquidator thereof to hand over to the trustee the assets of the business under their control.

On September 9, 1896, an action was commenced in the Chancery Division by Messrs. Bendit Brothers against Hirth, and the action was tried on December 21, 1897, when an injunction was granted against him with costs, which were subsequently taxed at 467*l.* 15*s.* 2*d.* On May 3, 1898, Messrs. Bendit Brothers served a bankruptcy notice upon Hirth in respect of this sum. On May 12 they presented a bankruptcy petition against him, founded upon his non-compliance with this notice; and on May 27 a receiving order was made upon the petition. It appeared from the statement of affairs of the bankrupt that his liabilities were 2204*l.* 15*s.* 6*d.*, and assets nil.

On December 9, 1897, Hirth, who since 1896 had carried on the business of a wholesale fancy jeweller at 22, Barbican, converted his business into a limited company registered under the name of Hirth & Co., Limited, with a nominal capital of 3000*l.* in 1*l.* shares. By the articles of the company, Hirth and Louis Horazeck, his uncle, were to be the first directors, and Horazeck was to be at liberty to delegate all or any of his powers as director to Hirth; Hirth was also to be the first chairman and the first managing director.

Horazeck, who resided at Munich, shortly afterwards resigned the post of director.

By an agreement dated March 7, 1898, and made between Hirth, therein called the vendor, of the one part, and Hirth &

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte.*

Co., Limited, therein called the company, of the other part, it was provided (inter alia) as follows: "(1.) The vendor shall sell, and the company shall purchase, the assets and property of the said business, together with the plant, stock-in-trade and effects, and all other the property of the vendor, situate at 22, Barbican, aforesaid, at the sum of 2000*l*. (2.) As part of the consideration for the said sale the company shall allot to the vendor or his nominees 2000 shares in the company, which shall be for all purposes fully paid up, and shall be numbered 1 to 2000 inclusive. (3.) As the residue of the consideration of the said sale the company shall undertake, pay, satisfy, and discharge all the debts and liabilities of the vendor in relation to the said business, and shall indemnify the vendor and his heirs, executors, administrators, estates, and effects from all actions, claims, and demands in respect thereof. (4.) The sale shall be completed as on the 10th day of December, 1897, when the said shares shall be issued to the vendor, and upon such payment and allotment as aforesaid being made the vendor shall, at the expense of the company, execute and do all such assurances or things as may reasonably be required for vesting in the company the said premises agreed to be hereby sold and giving to it the full benefit of the agreement. (5.) The business shall be deemed to have been carried on as from the 1st day of December last on the company's behalf, and, accordingly, the vendor shall be allowed all payments and expenses incurred and shall account for all moneys and other benefits received by him in relation to such business as from that day." This agreement was filed with the Registrar of Joint Stock Companies on March 10, 1898.

On March 11, 1898, the first meeting of the company was held, when there were present Hirth and one Drews, whom Hirth had appointed an ordinary director under the powers in that behalf in the articles. At this meeting the agreement of March 7 was confirmed; and the following shares were allotted, namely, five to Drews, who was a signatory of the memorandum of association; one each to the remaining six signatories (including Hirth), and 2000 to Horazeck, as nominee of Hirth, in pursuance of the contract of March 7, 1898. It was further

resolved that Hirth, the managing director, should act as secretary pro tem.; that a banking account should be opened; and that all cheques should be signed by the managing director and countersigned by the secretary. There were no shareholders of the company except the seven signatories of the memorandum of association and Horazeck.

On March 16, 1898, the banking account of the company was opened, and from that date until April 25, 1898, Hirth drew on the account twenty-two cheques payable to himself, amounting in all to 195*l.* 10*s.* These cheques were all signed—

"Hirth & Co., Limited.
"Carl Hirth, Managing Director.
"Carl Hirth, Secretary."

The company paid off some of Hirth's debts, and it also contracted debts of its own both before and after the date of the agreement.

On May 25, 1898, an extraordinary meeting of the company was held, at which a resolution was passed that it should be wound up voluntarily, and a liquidator was appointed.

The liquidator had since sold the assets of the company, and as the result of such sale he had in his hands a sum of between 300*l.* and 400*l.*, which was insufficient to satisfy its liabilities.

On August 2, 1898, Hirth's trustee in bankruptcy commenced the present proceedings.

Muir Mackenzie, and *Eldridge*, for the motion. This was a fraudulent transfer within the statute of 13 Eliz. c. 5 of the whole of the bankrupt's property to the company: *In re Carey*. (1) That case was overruled by the House of Lords in *Salomon* v. *Salomon & Co.* (2), but only on the question of agency. It is still a valid authority on the question of fraudulent transfer of property. The mere fact that the transfer of property was to a company now in liquidation is no answer to the claim of the trustee in bankruptcy to set it aside as fraudulent: *In re David Lloyd & Co.* (3) The question is whether the property is to be distributed amongst the creditors

(1) [1895] 2 Q. B. 624. (2) [1897] A. C. 22.
(3) (1877) 6 Ch. D. 339, 344.

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte.*

of the bankrupt or amongst the creditors of the company. This is not a claim in the winding-up, but under the general jurisdiction in bankruptcy. The principle of *Ex parte Chaplin* (1) applies. The covenant by the company to pay the debts of the bankrupt was merely illusory.

Reed, Q.C., and *Edward Clayton*, for the liquidator. The trustee has no greater right than the bankrupt, and is claiming to rescind after the commencement of the winding-up. The transfer was not void ab initio, but only voidable. It is too late for the trustee to elect to rescind after the commencement of the winding-up. The winding-up creates a trust for the creditors of the company who have a right to be paid out of its assets. If the transfer is set aside, the parties cannot be restored to their original positions. The covenant to pay the debts of the bankrupt which has been acted upon was valuable consideration for the transfer of the property.

Muir Mackenzie, in reply.

WRIGHT J. I am sorry to have to decide a question of this kind without the real facts as to the relation between the company and its creditors being fully investigated. But from the nature of the case there has been no reason to make such an investigation. The facts are not very clear; but I do not think that I should gain any advantage by further considering the matter. I am told that there has never been an instance of an order of this kind being made or asked for except in the case of *In re Carey*. (2) It seems to me that the order there made is not to the full extent law since the decision of the House of Lords in *Salomon* v. *Salomon & Co.* (3) Therefore I think that the decision in *In re Carey* (2) does not altogether cover the present case. On the evidence here I am satisfied that there was a real resolution to wind up this company, and therefore that there is an actual liquidation. If so, I am unable to see how, by an order made in exercise of bankruptcy jurisdiction, I can wholly avoid the transfer of property to a company now that the company is in liquidation. It seems to me that the argument is well founded that this agreement of

(1) (1884) 26 Ch. D. 319. (2) [1895] 2 Q. B. 624. (3) [1897] A. C. 22.

transfer of the property was a voidable contract, and that after the commencement of the liquidation it is too late to rescind, it being impossible now to restore things to the position in which they stood at the time when the supposed fraudulent agreement was made. Whether the effect of setting aside in this case the transfer would or would not be to interfere with the rights of any of the creditors of the company I do not know, but it is obvious that it might very greatly interfere with their rights. Mr. Muir Mackenzie agrees that at any rate such an order should be without prejudice to the rights of any persons who became creditors of the company after March 7, which is the date of the sale to the company; but I do not very well see how it can be limited in that way. The position of other persons may have become different, and might be affected by setting aside the transfer to the company. At the same time, while saying this I wish to guard myself very carefully against saying that no such relief can be given. It is not necessary to go that length to-day. Here it is sufficient to say that the difficulties are so great in this case that I cannot see my way to make the order. I do not say there may not be cases in which such an order might be obtained. In the present case the motion must be refused with costs.

H. L. F.

The trustee in bankruptcy appealed.

1899. Jan. 20. *Muir Mackenzie* (*Eldridge* with him), for the trustee in bankruptcy. The conveyance of March 7 was made with the object of putting the property of the debtor out of the reach of his creditors, and as against his creditors it is a fraudulent transaction both under the Statute of Elizabeth and under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*b*): *Ex parte Chaplin, In re Sinclair.* (1) The voluntary winding-up of the company is no bar to the rights of the trustee in bankruptcy: *In re Carey, Ex parte Jeffreys.* (2)

[LINDLEY M.R. The reasoning of that case is inconsistent with the decision of the House of Lords in *Salomon* v. *Salomon & Co.* (3)]

(1) 26 Ch. D. 319. (2) [1895] 2 Q. B. 624. (3) [1897] A. C. 22.

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte.*

There is nothing in the decision of the House of Lords which is inconsistent with the present application.

Herbert Reed, Q.C., and *Edward Clayton*, for the liquidator. Assuming this transaction to be fraudulent, which is disputed, the position of the parties is altered by the winding-up, and the trustee cannot now set it aside. Further, *In re Carey* (1) shews that the claim of the trustee is subject to the claims of the bonâ fide creditors of the company, who are entitled to be paid out of the assets existing at the time of the winding-up, and their claims are more than sufficient to exhaust the assets.

Muir Mackenzie, in reply. By the Bankruptcy Act, 1883, ss. 43 and 44, the bankruptcy of a debtor relates back to and commences at the time when the act of bankruptcy is committed, if it is committed within three months of the presentation of the bankruptcy petition, and the property of the bankrupt includes all property vested in him at the commencement of the bankruptcy. The consequence of this fraudulent conveyance is that, upon the receiving order being made against the debtor, the property vests in the trustee by relation back, and the fact that within the three months the transferee has contracted debts and has taken the statutory mode of having them liquidated does not affect his title.

Reed, Q.C., upon the effect of the relation back. This transaction, whether it is a fraud under the Statute of Elizabeth or an act of bankruptcy under the Bankruptcy Act, 1883, is not void, but is voidable at the election of the trustee; and unless the transaction which is the act of bankruptcy is void the relation back cannot operate to defeat the rights of persons who are entitled for value. Suppose the act of bankruptcy in question was a creditor's deed, the trustee might wish to approbate it, and it has never been held that he could not; but he would have no power to ratify a void transaction. Again, if this were a void transaction the trustee might bring an action of trover against any person who had the property. This being a voidable transaction, the resolution to wind up the company was passed before the trustee elected to avoid. The effect of the resolution is that the property which is then the property

(1) [1895] 2 Q. B. 624.

of the company has to be administered for the benefit of the creditors in a particular way. The winding-up interferes with the exercise of the ordinary rights of the creditors, and substitutes therefor the right to payment pari passu out of the assets: see Companies Act, 1862, ss. 85, 87, 133, 138; *In re Thurso New Gas Co.* (1) After that date it is too late to avoid the transaction as against them.

[The following cases were also referred to: *Stevenson* v. *Newnham* (2); *Butcher* v. *Stead* (3); *Shears* v. *Goddard* (4); *In re Carter and Kenderdine's Contract* (5); *In re Brall.* (6)]

LINDLEY M.R. This case involves many technicalities; but behind these is a question of the utmost importance to people who form these bubble companies. Here was a man named Hirth, a jeweller, who was a defendant in an action which was pending against him, and he resolved to turn his business into a limited company. A company was formed for taking over his business for a sum of 3000*l.*, and, to use not accurate legal language but colloquial language, he was the company. Of course there were seven members—he took care of that. He was the managing director; he was the secretary; he was everything; he had the entire control of it; he adopted machinery by which he could draw cheques as he liked, and he did draw cheques, and nearly all the cheques that he drew were payable to himself. Now the company is being wound up, and there is a struggle between Hirth's creditors represented by his trustee in bankruptcy, and the company's creditors represented by the liquidator, as to which set of creditors shall get the assets which Hirth purported to sell to the company.

If the Court should be in favour of the company, the practical result would be that much greater frauds could be perpetrated by traders in difficulties than is possible even now, since these bubble companies have been declared to a certain extent legal. The decision of the House of Lords in *Salomon's Case* (7) contains nothing which touches the point we have

(1) (1889) 42 Ch. D. 486.
(2) (1853) 13 C. B. 285.
(3) (1875) L. R. 7 H. L. 839.
(4) [1896] 1 Q. B. 406.
(5) [1897] 1 Ch. 776.
(6) [1893] 2 Q. B. 381.
(7) [1897] A. C. 22.

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte.*

Lindley M.R.

now to decide. *Salomon's Case* (1) has decided a great deal, and people have not been slow to take advantage of it: it has decided that a company can be legitimately formed under the Companies Acts by one person, or one or two persons, with all the rest men of straw, and that there is at present no machinery except winding-up by which it can be extinguished. The legal question decided in the House of Lords was whether the company could first of all maintain a petition for winding itself up and then get out of the bargain which it had made with its founders and promoters. The House of Lords held that it could not. But the question was never raised there whether the creditors of a sole trader who had converted himself into a company, and transferred all his assets to the company, could not impeach the transaction either as a fraud upon the creditors under the Statute of Elizabeth, or as an act of bankruptcy under the Bankruptcy Act, 1883. The point now raised is new to us, and is one of great practical importance. I have come to the conclusion that the view taken by the trustee in bankruptcy is right, and that the difficulty felt by Wright J. in giving effect to that view can be got over.

That the transaction of sale between Hirth and the company which was carried out by the agreement of March 7, 1898, was a juggle and a fraud admits of no doubt; but upon the evidence before us there is a difficulty in saying whether it can be reached under the Statute of Elizabeth, which relates to what are called frauds on creditors, and I think it can be more easily reached under the Bankruptcy Act, 1883. To reach it under the Statute of Elizabeth it must be shewn that the sale was of the whole, or substantially the whole, of Mr. Hirth's property; and it must be shewn that the company had notice that he was cheating his creditors. I do not say that we have before us evidence which ought to satisfy us judicially on those points. I have a strong opinion on it myself, but I feel that it would be safer not to go the length of upsetting this transaction under the provisions of the Statute of Elizabeth. The case, however, appears to me to fall as distinctly as possible within s. 4,

(1) [1897] A. C. 22.

sub-s. 1 (*b*) of the Bankruptcy Act, 1883. [The Master of the Rolls read the clause.] That extends the Statute of Elizabeth enormously, because here the Court has not to consider whether the person who takes the property knows anything about the fraud, nor whether that which is transferred is the whole, or substantially the whole, of the debtor's property. It has to consider the debtor and what he has done; and if he has made a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof, he has committed an act of bankruptcy. That is what the section says; it says nothing about void or voidable. Without going through the evidence there cannot be the slightest doubt that so far as Hirth was concerned he had recourse to this scheme to defeat the people who were suing him, and who ultimately got an order against him for more costs than he could pay. [The learned judge stated the facts, and continued:—]

Let us see how the matter stands. The section which lies at the foundation of this application, which is s. 4 of the Bankruptcy Act, 1883, says nothing about void and voidable, but says that certain transactions shall be acts of bankruptcy. Pausing there for a moment, it is impossible to say that because a deed, or a sale, or a conveyance is by that section made an act of bankruptcy it is then and there void and of no effect. That is obvious, because although a man may commit an act of bankruptcy he may never be adjudicated a bankrupt upon it; and of course if he is not, all this discussion as to acts of bankruptcy and as to void and voidable is beside the mark. You cannot say that because a man executes a deed which is declared to be an act of bankruptcy the deed is void as soon as he executes it, for the simple reason that you do not know whether circumstances will ever arise which will raise the question. I pass now to the sections which have ultimately to be considered, namely, the sections which deal with the property of a man who has committed an act of bankruptcy. The first section which is of any importance is the 43rd, which embodies what is called the doctrine of relation back. [The learned judge read the section.]

Mr. Hirth having been adjudicated bankrupt upon a petition

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte.*

Lindley M.R.

which was presented on May 12, 1898, his bankruptcy relates back to the transaction of March 7, 1898, if that was, as it clearly was, a fraudulent conveyance within the meaning of the 4th section of the Bankruptcy Act of 1883. Now we are getting on to ground where it is important to talk about void and voidable transactions. What is the effect of that? The effect of that can be gathered from s. 44—the section which vests in the trustee the assets which it is the trustee's business to get in and distribute amongst the creditors. [The learned judge read the section.]

We have, therefore, to consider what is the position of a trustee who finds that there has been a fraudulent conveyance, which is an act of bankruptcy, and who elects to impeach the transaction and demands back the property from the person in whose possession it is.. What is the answer to that? It appears to me that there is absolutely no answer at all except this: that there are certain provisions in the Bankruptcy Act which relate to what are called protected transactions; and, of course, if a transaction is protected by those provisions, then the trustee cannot enforce that claim. However, we need not trouble ourselves about them. The facts exclude the application of those sections. There is nothing, so far as I have gone yet, which points to any difficulty at all in the way of the trustee who claims this property upon the ground that the conveyance, which is an act of bankruptcy, was void under s. 43 as from its date, when it was overreached by the petition and the adjudication. So far, I do not think that there is any difference between the view which we are expressing and the view taken by the learned judge in the Court below.

Now we have to consider the effect of the winding-up of the company. Supposing that this company were an ordinary person, the title of the trustee would, in my opinion, be perfectly plain. What effect has the winding-up of the company? It appears to me that it really has none at all, and for this reason. The provisions in the Companies Act, 1862, which prevent any alteration in the state of the members, and prevent members from repudiating shares obtained by fraud, and so on, have no bearing at all upon the title of some outside

claimant who is not a member, or anything of the kind. There is nothing in the Companies Act, 1862, which prevents the claim of the trustee from being prosecuted against the liquidator except those sections which say that actions and suits and so on either will not be allowed to go on without the sanction of the Court, or may be stopped by the Court. This being a case of voluntary winding-up, actions and suits against the company by strangers and persons outside the company are not stopped by the Court, but there is power on the part of the liquidator to apply to the Court to stop them, and that power is exercised in a winding-up as the Court thinks fit. But there is nothing in that. It was argued that a winding-up resolution stopped the right of the creditors of the company to sue, and that as their right of action had been stopped, or at all events so altered that it might be stopped, they ought to be treated as being secured creditors, and as having in some way or other acquired over this property preferential claims which ought to override the title of the trustee in bankruptcy. That would be all very well if the title of the trustee in bankruptcy could be treated as accruing when he gave notice to impeach the transaction; it would be all very well as against everybody except the trustee in bankruptcy, whose title relates back. That doctrine is peculiar to bankruptcy; and it is because the trustee says, "This property, the moment I elect to avoid and do avoid, is mine from an anterior date under the special provisions of s. 43 of the Bankruptcy Act, 1883," that he overrides all the transactions and dealings which have been relied upon as an answer to his claim. That is the only point which has presented any difficulty; but I think I have shewn that, having regard to ss. 4, 43, and 44 of the Bankruptcy Act, 1883, there is no real difficulty about it when the circumstances are understood.

The appeal, therefore, must be allowed, and an order for the payment over by the liquidator to the trustee in bankruptcy of the money in his hands so far as it represents the business and assets which Hirth purported to sell to the company. The liquidator will, of course, be allowed any costs which he has incurred in realizing the assets; but I do not know on what

C. A. 1899

CARL HIRTH, *In re.* THE TRUSTEE, *Ex parte.*

principle he can expect any other costs. The trustee in bankruptcy will, of course, take his costs out of the assets when he gets them.

RIGBY L.J. I am entirely of the same opinion, and I need only deal with that part of the case where we differ from Wright J. I understand him to have held that the mere commencement of a winding-up is an absolute bar to the recovery of the property which was the property of the bankrupt, and which by reason of an act of bankruptcy has been, on the face of it, transferred to the company. It seems to me that that decision would place in the hands of persons who wished to avoid the payment of their debts a simple machinery by which they could do it to a very large extent. You have only to form a bubble company, wait until you see that the creditors (it was the trustee in bankruptcy in this case) are going to recover property which manifestly belongs to them and not to the company, and then with one or two confederates meet in a private room, and pass a resolution for the winding-up of the company; and from that time forth the debtor, who is the promoter of the company, and in this case the sole person who had anything to do really with the company, can keep his creditors out of the property. It would be a very lamentable state of things if there were any foundation for such a conclusion. The Companies Act by s. 133 says the property of the company shall be divided among the contributories after payment of the creditors. What is meant by "the property of the company"? The property which apparently is vested in the company at the time of the commencement of the winding-up, or the property which ultimately turns out to be the property of the company? I venture to think that the latter must be the proper construction. When the time for division has arrived you must find out if you can, and in the best way you can, what is the property of the company, and divide that, and that only. I am speaking in a general way. I do not wish to bind myself strictly to that, but for the purposes of this case I think I may say that that ought to be the meaning; and I do not think that anything that has been done here converts this property into

the property of the company. For myself, I should be willing to hold, independently of the other questions that have been argued, that, even if this were a mere voidable deed, and not a deed void in the strict sense of the term—even on that supposition—the passing of this extraordinary resolution to wind up was no bar whatever to proceedings for setting aside the conveyance and recovering the property, or, of course, in this case, as the property is not in existence, the proceeds of the property. It seems to me that that is sufficient to decide the case; but I entirely agree with what the Master of the Rolls has said somewhat outside that line of argument.

VAUGHAN WILLIAMS L.J. I am of the same opinion. I really have nothing to add to the exhaustive judgments which have already been delivered; but upon the facts of the case I wish to say that I should have been prepared to hold that on March 7, which was the date of the conveyance of this property to the company, the company by its agent, the managing director, Hirth himself, had full notice of the true nature of the transaction, so as to bring itself within the operation of the Statute of Elizabeth; and further, had full notice, for the purpose of preventing the company either from taking advantage of any of the protective sections, or from in any way successfully claiming the benefit of the position of a bonâ fide purchaser without notice.

Appeal allowed.

Solicitors: *Sugden & Harford; Firth & Co.*

H. B. H.

C. A.
1898
Dec. 5.
1899
Feb. 10.

[IN THE COURT OF APPEAL.]

In re BEESTON.

Bankruptcy—Act of Bankruptcy—Execution—Seizure of Goods and Possession of Sheriff for Twenty-one Days—Sheriff's Fees—Possession Money—Continued Possession at Request of Debtor—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11.

The sheriff levied execution on the goods of a debtor and remained in possession for fifteen months. This was done at the request of the debtor and with the consent of the execution creditor. At the end of the fifteen months a receiving order was made against the debtor on his own petition, and the goods were sold. On the taxation of the costs of the execution, the Board of Trade disputed the right of the sheriff to possession money for the full period:—

Held, that the act of bankruptcy created by s. 1 of the Bankruptcy Act, 1890, consisted of—first, the seizure by the sheriff; and, secondly, his remaining in possession for twenty-one days; and that his subsequent continuing in possession under the same seizure did not constitute a further or continuing act of bankruptcy; that consequently there was no act of bankruptcy under this section available against the debtor; and that the sheriff was entitled under s. 11 to possession money for the full period as costs of the execution.

In re Hurley, (1893) 10 Morr. 120, approved and followed.

THIS was an appeal by the Board of Trade against the decision of the taxing master of the High Court on a review of taxation by him under rule 124 of the Bankruptcy Rules, 1886, whereby he refused to vary the taxation by the registrar of the Manchester County Court.

On July 27, 1896, the sheriff levied execution on the goods of the debtor for 90*l.* 17*s.* 8*d.*, and remained in possession until October 27, 1897. This he did at the request of the debtor and with the consent of the execution creditor.

Prior to December, 1896, the debtor had paid the execution creditor the whole of his debt except 3*l.* 19*s.* 4*d.* The subsequent possession was therefore in respect of the sheriff's costs, of which the debtor had paid sums amounting to 50*l.* 10*s.*

On October 26, 1897, a receiving order was made against the

debtor on his own petition, and on the following day the sheriff sold.

On taxation of the sheriff's bill by the registrar of the county court, the sum of 105*l.* 18*s.* 6*d.* was allowed him in respect of the costs of realizing the judgment debt. The greater part of this was for possession money. This was confirmed by the taxing master of the High Court.

Muir Mackenzie, for the Board of Trade. The costs objected to are not proper costs of the execution, because the sheriff remained in possession for an unreasonable time: *In re Finch*. (1) The sheriff cannot justify remaining in possession for more than twenty-one days, because after the expiration of the twenty-one days an act of bankruptcy was committed (2) by the execution debtor, and he was no longer master of his estate. It is immaterial that more than three months afterwards elapsed before a petition in bankruptcy was presented.

Reed, Q.C., and *Cautley*, for the sheriff. The act of bankruptcy committed by the sheriff remaining in possession for twenty-one days was not an available act of bankruptcy. The moment three months had elapsed the goods remained the property of the execution debtor, and he could give a good charge upon them; and the sheriff, having remained in possession at the request both of the execution creditor and of the execution debtor, is entitled to all the costs of the execution: *In re Hurley*. (3)

Muir Mackenzie, in reply. The question is, whether the execution creditor and execution debtor can create such a charge as this, when they request the sheriff to remain in possession for a most unreasonable time.

WRIGHT J. In the case of *In re Hurley* (3) the sheriff remained in possession for more than twenty-one days under

(1) (1891) 8 Morr. 284.

(2) Sect. 1 of the Bankruptcy Act, 1890, provides as follows:—

"A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

(3) 10 Morr. 120.

C. A. 1899

BEESTON, *In re.*

Wright J.

the writs, and—apart from the question now raised that an act of bankruptcy was committed by the sheriff remaining in possession for twenty-one days—I am bound by the decision in that case to hold that, where the sheriff continues in possession at the request of the execution creditor and of the execution debtor, the costs of the execution are a first charge on the proceeds of sale of the goods. I cannot help thinking that decision was right. In that case the point was not made that an act of bankruptcy had been committed; but where, as here, nothing happens under it, and the sheriff remains in possession at the request of both parties, I must hold that the sheriff's costs of possession are a first charge on the property. I think, therefore, that the decision of the taxing master must be affirmed.

H. L. F.

The Board of Trade appealed.

1899. Feb. 10. *Sir Richard Webster, A.-G.*, and *Muir Mackenzie*, for the Board of Trade. A sheriff is not entitled to more than reasonable costs, and those costs will not include the costs of remaining in possession for an unreasonable time. In order to entitle the sheriff to possession money he must be in possession in obedience to the writ. He will not be entitled if he remains in possession at the request of the parties after the execution debt is discharged: see *Masters* v. *Lowther* (1); *Underden* v. *Burgess* (2); *Levy* v. *Champneys* (3); *Kirk* v. *Purchase* (4); *In re Finch, Ex parte Sheriff of Essex.* (5) *In re Hurley* (6), unless distinguishable, was wrongly decided and ought not to be followed. No question was raised there as to whether the period of possession had been anything unusual. The defect in the reasoning of that case is that it draws no distinction between holding possession at the request of the debtor and holding possession for the purposes of the sale. Sect. 11 of the Bankruptcy Act, 1890, gives the sheriff a charge for the costs of the execution and a charge which is available against the general body of creditors. That does not extend to the

(1) (1852) 11 C. B. 948.
(2) (1835) 4 Dow. P. C. 104.
(3) (1835) 4 Ad. & E. 365.
(4) (1893) 32 L. R. Ir. 359.
(5) 8 Morr. 284.
(6) 10 Morr. 120.

costs of remaining in possession otherwise than for the purposes of the execution, and costs of possession with the consent of the debtor would not of necessity be costs of execution under all circumstances. The charge is not given for the purpose of enforcing an agreement between the sheriff and the debtor.

Further, by s. 1 of the Act of 1890, a debtor who allows the sheriff to remain in possession for twenty-one days commits an act of bankruptcy. After that period the sheriff is not in possession for the purposes of his writ so as to make the possession-money costs of the execution, and the debtor is no longer in a position to consent to his remaining in possession.

Reed, Q.C., and *Rose Innes*, for the sheriff. First, assuming that there is no bankruptcy, and that the Attorney-General represents the judgment debtor: the debtor would be compelled to pay these costs before he could get back the goods. When the sheriff is directed by the execution creditor not to sell and is requested by the execution debtor not to sell it is a strong thing to say he must either go out or forfeit the costs of staying. Although the sheriff is an officer of the Court, the Court will not put him in motion except at the instance of the execution creditor, and he is bound to obey the execution creditor's directions: *Barker* v. *St. Quintin.* (1) *In re Hurley* (2) is in accordance with previous decisions. The sheriff may remain in possession until the costs of the execution are satisfied, and those costs include possession money unless wrongful: *Ex parte Lithgow, In re Fenton.* (3) There is no authority to shew that in a case like this he would not be entitled to his fees.

Secondly, as to the act of bankruptcy, that having been committed at the end of the first period of twenty-one days from the date of seizure, and no petition having been presented within three months of the expiration of that period, it is not now available against the debtor.

Sir Richard Webster, A.-G., replied.

LINDLEY M.R. I do not think that when this case is threshed out as it has been there is any real difficulty in coming

(1) (1844) 12 M. & W. 441, 450. (2) 10 Morr. 120.
(3) (1878) 10 Ch. D. 169.

C. A. 1899

BEESTON, *In re.*

Lindley M.R.

to a proper conclusion, and I must say that the conclusion which Wright J. came to appears to me to be the proper one. I will only say by way of preliminary remark that I am not at all surprised at the Board of Trade having taken this matter up, for it is rather startling.

It appears that a writ of fi. fa. upon proper judgment was executed against the bankrupt, I will call him, on July 26, 1896, and for twenty-one days after that the sheriff was in possession and nothing was done. That under the 1st section of the Bankruptcy Act of 1890 was an act of bankruptcy, and if within three months after that the judgment debtor had become bankrupt, the consequence would have been that the title of the trustee in bankruptcy would have related back, and, unless the transaction could have been protected, he would have been in a far better position than he is under the circumstances which I will relate. In my opinion there was here no act of bankruptcy within the three months of the receiving order being made. That depends, of course, on the true construction of s. 1 of the Act of 1890; but that is the view I take of it for the reasons which I will give presently. Then, there being no act of bankruptcy, the execution debtor and execution creditor were in the position of ordinary execution debtors and execution creditors, and there was no right of any other creditors which had to be considered in determining how long the sheriff should remain in possession or how soon he should go out. If the execution debtor chose to consent to the sheriff retaining possession for his own convenience, the costs of the possession would, as against the execution debtor, be costs of execution. I do not mean to say that they would as against other people, because, of course, as against an execution creditor, if he did not consent, no arrangement between the sheriff and execution debtor could deprive him of his rights; but as regards the execution debtor the costs of the continued possession would be costs of execution. I have not the slightest doubt about that.

Now then, if that is so, in what better position is his trustee in bankruptcy? On general principles applicable to bankruptcy the trustee in bankruptcy is in no better position than the

bankrupt except, so far as I know, in three classes of cases. He has under the reputed ownership clause a right to override transactions which the bankrupt could not impeach. He has under those sections which introduced the doctrine of relation back a right to impeach transactions which the bankrupt could not, and, of course, under the Statute of Elizabeth the trustee can impeach transactions which the bankrupt cannot on the ground that they are frauds against creditors. But if you eliminate those classes of cases (and we have nothing to do with them here) the trustee in bankruptcy is in no better position than the bankrupt himself. The consequence of that is that the trustee in bankruptcy is not in a position to say that this possession money is not as against him that which it would be as against the bankrupt, namely, costs of execution. That is the short answer that I give to this case. That is the view, as I understand it, on which the case of *In re Hurley* (1) proceeded, and although, of course, the consent to continued possession might be impeached on the ground that the trustee was not bound by it, either because his title related back or because of the Statute of Elizabeth, unless he can impeach it, the possession money does not cease to be as against him that which it would be as against the bankrupt.

Now I will read the two sections which are important. The first is s. 1 of the Bankruptcy Act of 1890, which would avail the trustee if you could read it so as to make the act of bankruptcy come down to October, 1897, or within three months of it. But the dates are important. The fi. fa. was executed and the sheriff took possession in July, 1896, and twenty-one days after that would expire on August 17, 1896, and the receiving order, the title of the trustee, did not occur until October, 1897. [The learned judge read s. 1 of the Bankruptcy Act, 1890.] Now, is it possible to fairly construe that section so as to make continued possession for more than twenty-one days either a continued act of bankruptcy, or, if it should be a succession of periods of twenty-one days, a succession of acts of bankruptcy? I do not think that is consistent with the language. We know perfectly well that acts of bankruptcy have to be regarded

(1) 10 Morr. 120.

C. A. 1899

BEESTON, *In re.*

[Lindley M.R.

critically and carefully. There is no such thing as an act of bankruptcy except that which the statute declares to be one, and when the statute says an act of bankruptcy is committed if an execution has been levied by seizure and the goods have been held by the sheriff for twenty-one days, that means that the seizure and holding for twenty-one days together are essential for the consideration of whether there is an act of bankruptcy or not. It seems to me it would be straining this section beyond all reason to say that there was a succession of acts of bankruptcy at the expiration of every period of twenty-one days, or that there has been one continued act of bankruptcy running over a year and a half. That appears to me to be the true construction of the section. But it gets rid of any act of bankruptcy to which the title of the trustee can relate—a most important point, to my mind—because if the trustee's title related back, we should have to consider the matter on totally different grounds. I pass now to the other section. [The learned judge read s. 11, sub-ss. 1 and 2.] Here the sheriff has sold the goods, and he has deducted as costs of execution the whole of his possession money. The answer to this appeal is that he could have done it as against the debtor under the circumstances of this case, and the trustee is in no better position.

For these reasons I think that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. The case all turns on the question of what costs are costs of execution. Reference was made to the practice which prevailed in interpleader cases; but that practice is founded upon the fact that the interpleader order really puts an end to the execution, and the sheriff thenceforth holds, if he holds at all, on the terms contained in the interpleader order. It seems to me the costs of execution must be, unless impeached before the taxing master, as they may well be, on some proper ground, costs of execution as between the parties. I say nothing about other people being bound. In certain cases clearly they would not be, as, for instance, where the receiving order was made within three months and it turns out that the debtor has been dealing with property which no longer belongs to him; but that is a very different

case. In the circumstances of this case I cannot see my way to limit the words "costs of execution" contained in the Act in the way which has been suggested.

VAUGHAN WILLIAMS L.J. I entirely agree. There can be no doubt whatsoever that these costs of possession, apart from the act of bankruptcy or the making of a receiving order, would be costs which the sheriff would be entitled to take out of the proceeds of the levy. Of course, I am speaking of costs which are bonâ fide incurred in the course of levying the execution.

Now, that being so, I agree with the Attorney-General that the right of the sheriff to these costs here does not depend directly upon the ordinary statutes governing the right of the sheriff to his fees and costs, but depends upon the 11th section of the Act of 1890. But that section says that the costs of execution shall be a first charge on the goods or money so delivered, and the only question really that we have to decide in the present case is what costs are covered by or included in those words in this section, "costs of execution." Does it mean the same costs as would have been recoverable by the sheriff apart from the bankruptcy, or does it mean a portion only of those costs? Speaking for myself, I do not see a word in the section to lead one to suppose that the words "costs of execution" here mean anything else than costs of execution to which the sheriff would have been entitled apart from the bankruptcy. Of course, if you have got an earlier act of bankruptcy prior to the realization of these goods under the execution, the goods would cease to be subject to the execution, because they would cease to be the goods of the bankrupt, and the title of the trustee in bankruptcy by relation would prevail. But, apart from that, it seems to me perfectly clear on these words here that the costs of execution cover all the ordinary costs which a sheriff would be entitled to if such costs were bonâ fide incurred in the course of the execution.

I have only one word to add, and that is a word about whether the bankrupt here by the seizure and the possession for twenty-one days has committed either a continuous act of bankruptcy for the whole term of possession, or an act of

C. A. 1899

BEESTON, *In re.*

Vaughan Williams L.J.

bankruptcy which will be repeated each time that there is a fresh period of twenty-one days of possession. I have no doubt myself that it is one act of bankruptcy; that it is not a continuous act of bankruptcy; and it is not a repeated act of bankruptcy on the happening of each fresh period of twenty-one days.

I entirely agree with all that has been said by the Master of the Rolls as to the words of the section; but I wish to add one observation. Until the recent legislation there was no such act of bankruptcy as this act of bankruptcy constituted by seizure and remaining in possession for twenty-one days or any other time. The act of bankruptcy was by execution for a certain amount followed by sale, and it is that which has been extended. One finds here in this section two things together, and I have no doubt myself that if, as the Legislature intended, the act of bankruptcy defined in respect of the seizure and sale be one act done at the instance of the execution creditor for the purpose of the realization of his security—a security gained by seizure—so in respect of the continuing in possession the act of bankruptcy is an act of bankruptcy which takes its origin at the seizure, and whether the seizure be followed by sale, or whether the seizure be followed by possession for twenty-one days, there is only one act of bankruptcy; and, if there is no fresh seizure, there is no fresh act of bankruptcy.

LINDLEY M.R. The appeal will be dismissed, with costs in the usual way.

Appeal dismissed.

Solicitors: *R. Murton; A. G. Dinn.*

H. B. H.

Applied. YOUNGHUSBAND *v.* LUFTIG. [1949] 2 All E.R. 72.

HUNTER *v.* CLARE.

1899 *Jan.* 24.

Medical Practitioner—"Physician"—False Description—Medical Act, 1858 (21 & 22 *Vict. c.* 90), *s.* 40—*Medical Act,* 1886 (49 & 50 *Vict. c.* 48), *s.* 6.

By s. 40 of the Medical Act, 1858, "any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician . . . . or any name, title, addition or description implying that he is registered under this Act, or that he is recognised by law as a physician . . . ." is made liable to a penalty on summary conviction.

By s. 6 of the Medical Act, 1886, a registered medical practitioner is entitled to practise medicine, surgery and midwifery in the United Kingdom.

A licentiate of the Society of Apothecaries of London under a diploma granted by that body since 1886, although duly registered as a medical practitioner under the Medical Acts and entitled to practise medicine, surgery and midwifery, is not entitled to describe himself as a physician; but such a description, though incorrect, does not subject him to the penalty imposed by s. 40 of the Medical Act, 1858, unless it be also made wilfully and falsely.

CASE stated by justices for the county of Cambridge under 20 & 21 Vict. c. 43.

The appellant had been summoned to answer an information and complaint preferred by the respondent charging that he "did wilfully and falsely pretend to be and take and use the name and title of physician contrary to the Act (21 & 22 Vict. c. 90), s. 40, and the Acts amending the same."

The following facts were proved at the hearing and were admitted by both parties. The appellant was a duly registered medical practitioner entitled under the Medical Act, 1886, to practise medicine, surgery and midwifery. In the month of December, 1897, he attended one William Hawkins, and on December 28, 1897, and on March 23, 1898, he made use of the name and title of physician by causing to be printed and delivered to the said William Hawkins and to one Elizabeth Shatton certain bill-heads bearing the words "To H. Kingsley Hunter, physician and surgeon, for professional attendance, &c."

For the appellant it was contended that he was in possession of a diploma granted by the Society of Apothecaries of London

1899

HUNTER v. CLARE.

dated October 19, 1893, in pursuance of which he was admitted a licentiate of that society and registered as such, and which diploma stated that he possessed the knowledge and skill requisite for the efficient practice of medicine, surgery and midwifery, and that being so registered, and by virtue of s. 6 of the Medical Act, 1886, (*a*.) he was entitled to take and use the titles of "physician" and "surgeon," if he thought fit to do so: (*b*.) that, notwithstanding the use of the name or title of physician, there was nothing to shew that the appellant wilfully and falsely used the same; that on the contrary he did so in good faith; and, further, that he was authorized and justified in so doing in consequence of the following note, which was produced and admitted as purporting to be issued by the Society of Apothecaries of London:—

"Society of Apothecaries of London.—Blackfriars, London, E.C.—The L.S.A. (1886) can call himself by any title or titles which he prefers to adopt denoting his right to practise medicine, surgery and midwifery, provided that he does not directly or indirectly assume a title conferred by another licensing body or university."

In support of the appellant's contentions the case of *Ellis* v. *Kelly* (1) was cited.

For the respondent it was contended that the case was in all respects similar to *Reg.* v. *Baker* (2), that the appellant had no right under his diploma to take and use any other or additional name or title than that of "L.S.A.," and that whenever he did so and persisted in doing so he was guilty of the offence charged.

The justices were of opinion that the case was governed by *Reg.* v. *Baker* (2), and that the appellant had committed an offence under 21 & 22 Vict. c. 90, s. 40, and accordingly convicted him.

The questions of law for the opinion of the Court were: (*a*.) Whether or not the appellant, holding the title of "L.S.A.," and being registered as such, was authorized to take and use

(1) (1860) 6 H. & N. 222; 30 L. J. (M.C.) 35.

(2) (1891) 66 L. T. 416; 56 J. P. 406.

the name and title of physician in the manner in which he used it. (*b.*) Whether on the facts stated in the case the justices were right in finding that the appellant so described himself wilfully and falsely within the meaning of 21 & 22 Vict. c. 90, s. 40. (1)

Haldane, Q.C. (*Condy* with him), for the appellant. The appellant, having been duly registered as a licentiate of the Society of Apothecaries since 1886, is entitled to take and use the title of physician. Under the Medical Act, 1886, a practitioner must, as a condition entitling him to be registered, have a qualification in both medicine and surgery, and the appellant was legally entitled under his licence to practise in medicine, surgery and midwifery; being so entitled, it was no offence on his part to call himself a physician and surgeon. In s. 40 of the Medical Act, 1858, the term "physician" means a practitioner of physic—that is, of medicine and surgery, in the ordinary and popular sense, and does not mean a member of any particular body, such as the Royal College of Physicians. The titles "physician" and "surgeon" are not appropriated by the Legislature to one or other of the two specific bodies, the Colleges of Physicians and Surgeons respectively. The case of

(1) By 21 & 22 Vict. c. 90 (The Medical Act, 1858), s. 40, "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding twenty pounds."

By 49 & 50 Vict. c. 48 (The Medical Act, 1886), s. 6, "On and after the appointed day a registered medical practitioner shall, save as in this Act mentioned, be entitled to practise medicine, surgery and midwifery in the United Kingdom, and (subject to any local law) in any other part of Her Majesty's dominions, and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians, the fellows of which are prohibited by by-law from recovering at law their expenses, charges, or fees, in which case such prohibitory by-law, so long as it is in force, may be pleaded in bar of any legal proceeding instituted by such fellow for the recovery of expenses, charges, or fees."

1899

HUNTER v. CLARE.

Reg. v. *Baker* (1) is distinguishable, for in that case the appellant, having a sham qualification, passed himself off as having a real one; here the appellant has a real qualification, and the only question is whether the word "physician" is an apt and legal description of that qualification. Even if the appellant is not in strictness entitled to call himself a physician, *Ellis* v. *Kelly* (2) is a clear authority to shew that he has not wilfully and falsely used the name within the meaning of s. 40 of the Medical Act, 1858. [He also cited *Attorney-General* v. *Royal College of Physicians* (3); *Davies* v. *Makuna.* (4)]

Muir Mackenzie, for the respondent. The conviction was right. The licence of the Society of Apothecaries, though granted since 1886, does not authorize its holder to describe himself as a physician or surgeon, although it gives him the right to practise medicine and surgery. The distinction between the three orders of physicians, surgeons and apothecaries has been kept alive by the Legislature, and the right given to an apothecary to practise medicine or physic does not entitle him to call himself by a name or title which suggests that he holds the diploma of the College of Physicians. There is nothing to distinguish the present case from *Reg.* v. *Baker.* (1) The word "physician" is used in s. 40 of the Medical Act, 1858, as meaning a person holding the diploma of the Royal College of Physicians. [He also cited *Andrews* v. *Styrap* (5); *Blogg* v. *Pinkers* (6); *Royal College of Physicians* v. *General Medical Council* (7); *College of Physicians* v. *Rose.* (8)]

Haldane, Q.C., in reply.

LAWRANCE J. The question which we have to decide is whether a person holding a certificate or diploma from the Society of Apothecaries, by which he is entitled to practise medicine, surgery and midwifery as well as to act as an apothecary, is entitled to describe himself as a physician—whether in so doing he is contravening the provisions of s. 40

(1) 66 L. T. 416; 56 J. P. 406.
(2) 6 H. & N. 222; 30 L. J. (M.C.) 35.
(3) (1861) 1 J. & H. 561.
(4) (1885) 29 Ch. D. 596.
(5) (1872) 26 L. T. (N.S.) 704.
(6) (1824) Ry. & M. 125.
(7) (1893) 62 L. J. (Q.B.) 329.
(8) (1703) 3 Salk. 17; 6 Mod. 44.

of the Medical Act, 1858. In my judgment he is not entitled so to describe himself, and if he did so "wilfully and falsely" the justices would be quite right in convicting him. It is unnecessary for me to go through the various cases and statutes which have been cited to us in argument. Up to the year 1886 the only certificate granted by the Society of Apothecaries was one entitling the holder to practise as an apothecary; but in that year the three bodies into which the profession is divided came to the conclusion that for the future no one should have a certificate entitling him to practise in one branch only; but that he must pass a qualifying examination in all three branches. The appellant in the present case had passed in all the three branches, and I gather from the correspondence that he had also a foreign diploma, and that he originally described himself as an M.D.; that it was pointed out to him that this was wrong, and that he then described himself as a "physician." The question arises as to the meaning with which the description "physician" was used; whether it was used in a general and colloquial sense as being equivalent to the expression "medical man," or whether it was used in a more definite sense—a sense which would import to most people that he held a medical degree of one of the universities or a diploma entitling him to call himself a physician. I think the latter was the real meaning of the word: it was the meaning which would ordinarily be conveyed to anybody who saw the word on a brass plate. On that point, therefore, I think that the conviction was right.

I now come to the other point, whether the appellant "wilfully and falsely" pretended to be a physician. In *Ellis* v. *Kelly* (1), a person who was legally qualified as a surgeon and apothecary, and was registered as such under the Act, possessed also a German medical diploma, and called himself "Dr."; this was held not to bring him within the purview of s. 40 of the Act. This case was followed by that of *Andrews* v. *Styrap* (2), where a druggist, not registered under the Medical Act, described himself as M.D. on the ground that he held the diploma of doctor of medicine granted by an American

(1) 6 H. & N. 222; 30 L. J. (M.C.) 35. (2) 26 L. T. (N.S.) 704.

1899

HUNTER v. CLARE.

Lawrance J.

university on payment of a sum of money; he was held to be within the section. That, of course, was a much stronger case than the present; the man was pretending to be an M.D. in England, though he was only the possessor of a worthless foreign diploma. In the present case, after reading the correspondence, it seems to me that the appellant was determined to try the question of his right to use the title of "physician," and that he in effect said, "You have convinced me that I cannot call myself M.D.; but as I hold a certificate entitling me to practise medicine and surgery, I am entitled to call myself a physician." I think that his contention is wrong, but that in doing what he did he was not doing it wilfully and falsely within the meaning of the section, but in the assertion of a right, however wrong his view may have been. I think that the conviction should be quashed on that ground; there was no evidence that the appellant was doing what he did wilfully and falsely. As, however, the appellant has not succeeded on the main part of the appeal, the conviction will be quashed without costs.

CHANNELL J. Upon the whole I am of the same opinion. I think, though I feel some doubt upon the point, that the appellant wrongly described himself as a physician. This is the main point on which our decision is asked, for the learned counsel who appear for their respective clients are really instructed on behalf of these two societies, who want a decision of the question whether it is a true description for a gentleman holding the certificate of an L.S.A. (1886) to describe himself as a physician. The answer depends entirely, as I think, upon the sense in which that word is used in s. 40 of the Act of 1858. If "physician" there means simply a person duly qualified in law to practise in physic, then it seems to me that the appellant is a physician within the meaning of the section. If at one time it was not so, a licentiate of the Society of Apothecaries is certainly since 1886 entitled to practise medicine and surgery, and if the word "physician" is used in s. 40 in a popular sense, I should feel bound to say that he was a person entitled to practise in physic; for if in any sense there can be

said to be a distinction between physic and medicine, there is certainly none in the popular sense of those words. If, therefore, the word, "physician" in s. 40 is a general word, meaning a person legally entitled to act as a doctor (in the popular sense of that word), then the appellant was entitled to call himself a physician. But having regard to the fact that prior to the Act of 1858 the term "physician" was commonly used in a technical sense as meaning a member of the highest grade of medical practitioners, I think that the word was used in the same sense in that Act. There is, I think, some confirmation of this view in the fact that most of these words have application to specific bodies entitled to grant qualifications, and that the word "physician" had acquired a technical sense and was used as importing a particular grade of medical practitioner; in that technical sense it is not correct to say that the holder of a certificate of L.S.A. is a physician. Certainly he was not so before the Act of 1886, for physic included not only medicine, but surgery also; and the Society of Apothecaries did not then grant qualifications in surgery. That being the case, we have no binding authority upon the question of the meaning of "physician" in the section. At first sight I thought that *Reg.* v. *Baker* (1) was an authority which bound us to decide against the appellant; but upon further consideration I do not think so. In the first place, that case was argued upon a rule for a certiorari, so that any jurisdiction in the justices to decide as they did would have necessitated the discharge of the rule; and, secondly, it was before the year 1886, and the qualification of the practitioner did not then authorize him to practise in surgery, and he was not a physician. Upon the whole, therefore, I think, though not without doubt, that the word "physician" is used in s. 40 in a technical sense, and that in that sense the appellant is not a physician.

Then, did the appellant "wilfully and falsely" describe himself as a physician? On that point *Ellis* v. *Kelly* (2) is a distinct authority. It is said that Lord Bramwell subsequently recanted some of his opinions in that case, but it does not appear what he recanted; at any rate, his decision remains,

(1) 66 L. T. 416; 56 J. P. 406. (2) 6 H. & N. 222; 30 L. J. (M.C.) 35.

1899

HUNTER v. CLARE.

Channell J.

and it was this: that the practitioner in that case was not really an M.D. in the sense in which that expression was used in the Act, but that he had reasonable grounds for thinking that he was; if that is the meaning of the judgment, it covers the present case. The difference between that case and the subsequent one of *Andrews* v. *Styrap* (1) is that in the former case there was a foreign qualification, but a genuine one, while in the latter there was only a bogus diploma for which no examination was necessary and for which the practitioner wrote and paid a sum of money in order to represent himself as an M.D. That is what Martin B. meant when he said that the practitioner "did it on purpose." I cannot treat *Ellis* v. *Kelly* (2) as overruled or impugned by *Andrews* v. *Styrap*. (1) I think, therefore, that although the appellant incorrectly described himself as a physician, he did not do so "wilfully and falsely" upon the grounds explained by the Court in *Ellis* v. *Kelly*. (2) The conviction will therefore be quashed; but as our decision upon the point mainly argued is in favour of the respondent, it will be right that it should be quashed without costs. The justices ask us two questions: the first, "Whether or not the appellant holding the title of L.S.A. and being registered as such is authorized to take and use the name and title of physician in the manner the appellant so used it?" we answer in the negative. To the second, "Whether on the facts stated we were right in finding that the appellant so described himself wilfully and falsely within the meaning of 21 & 22 Vict. c. 90, s. 40?" we say that the justices were wrong, and on that ground we quash the conviction.

Judgment for the appellant.

Solicitors for appellant: *Upton, Atkey & Co.*
Solicitor for respondent: *F. W. Farrer.*

(1) 26 L. T. (N.S.) 704. (2) 6 H. & N. 222; 30 L. J. (M.C.) 35.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 3, 8.

CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY, LIMITED.

Sale of Goods—Document of Title, Possession of—Consent of Seller—Draft, Failure to Accept—Transfer of Bill of Lading to Sub-vendee—Stoppage in Transitu—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2; *s.* 47—*Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1; *ss.* 9, 10.

In fulfilment of a contract for the sale of a certain quantity of copper the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on the defendants' ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, and delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, and they thereupon paid him the price of the copper. The plaintiffs took the bill of lading in good faith, and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper in transitu. In an action by the plaintiffs against the defendants for non-delivery of the copper:—

Held, reversing the judgment of Mathew J., that, the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and that the sellers had no right to stop it in transitu.

APPEAL from the judgment of Mathew J. (1)

The plaintiffs, as indorsees of a bill of lading for certain copper, sued the defendants, who were shipowners, for damages for non-delivery of the copper, or in the alternative for a conversion thereof.

On July 12, 1897, the firm of Steinmann & Co., of Liverpool, contracted to sell to one Pintscher, a merchant of Altona, ten tons of copper, to be delivered, c.i.f., at Rotterdam, payment to be made by his acceptance at thirty days from the date of the bill of lading.

The copper in question was shipped from Swansea in the defendants' steamship *Collier* under a bill of lading which

(1) [1898] 2 Q. B. 61.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

provided that it was to be conveyed to Bristol and thence forwarded to Rotterdam by a steamer of the Bristol Steam Navigation Company, Limited. On August 27, 1897, the plaintiffs Cahn and Mayer purchased of Pintscher ten tons of copper. Upon August 30, 1897, Steinmann & Co., in fulfilment of their contract with Pintscher, forwarded by letter to Pintscher the bill of lading for the copper indorsed in blank with a draft for the price of the copper for his acceptance. This letter reached Pintscher, who was then insolvent, on September 1, and he thereupon handed the bill of lading to his banker in order that the banker might deliver it to the plaintiffs in fulfilment of Pintscher's contract with them upon payment by them of the price of the copper, which was to be placed to the credit of Pintscher's account with the banker, which was then overdrawn. Pintscher never accepted the draft. On September 2 the banker handed the bill of lading to the plaintiffs, and they paid the price of the copper in cash to the banker, who credited Pintscher with it in account. The plaintiffs took the bill of lading in good faith and without notice of the rights of Steinmann & Co. in respect of the copper. Before the copper arrived at Rotterdam, Steinmann & Co., becoming aware that Pintscher was insolvent, gave notice to stop it in transitu, which they succeeded in doing upon giving an indemnity to the defendants.

Mathew J. gave judgment for the defendants.

Joseph Walton, Q.C. (*J. A. Hamilton* with him), for the plaintiffs. Pintscher, as buyer of the goods, having obtained possession of the bill of lading with the consent of Steinmann & Co., the sellers, the transfer of it by him to the plaintiffs, who received it in good faith, and without notice of Steinmann & Co.'s rights in respect of the goods, had, by virtue of s. 25, sub-s. 2, of the Sale of Goods Act, 1893, the same effect as if Pintscher had been a mercantile agent within the meaning of the Factors Acts in possession of the bill of lading with the consent of the owner. By s. 2, sub-s. 1, of the Factors Act, 1889, a sale, pledge, or other disposition of the goods represented by the bill of lading made by such an agent is as valid

as if he were expressly authorized by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. By s. 1, sub-s. 1, of the Factors Act, 1889, "mercantile agent" means for the purposes of that Act a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. By sub-s. 2 of the same section "possession" means actual custody. The case of *Shepherd* v. *Harrison* (1), which was relied on in the Court below for the defendants, has no application to this case. No question as to the Factors Acts arose there. All that was held was that, the bill of exchange not having been accepted, the property in the goods did not pass to the buyer. The effect of Pintscher's not accepting the bill of exchange no doubt was that the property in the goods did not pass to him; but the provisions of the Factors Acts can only have application to cases where the property in the goods is not in the person making the disposition. The fact that possession of the bill of lading was given to Pintscher upon a condition is immaterial, for he none the less obtained possession of it with the consent of the sellers. If he had obtained possession of it by a trick, so as to be guilty of larceny of it, that might not be obtaining possession with the consent of the seller, but that is not the present case. It is immaterial that the contract for the sale of the goods to the plaintiffs was before Pintscher obtained possession of the bill of lading. The plaintiffs did not pay for the goods until the bill of lading was transferred to them. It is the delivery or transfer of the goods or documents of title to them under a sale, not the sale itself, which is validated by s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and there can be no doubt that such a delivery or transfer is a disposition of the goods within the Factors Act, 1889, s. 2, sub-s. 1. The bill of lading represents, and is the symbol of, the goods themselves, and the transfer of it as such is a disposition of the goods. All

(1) (1871) L. R. 5 H. L. 116.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

that is necessary to bring the case within s. 25, sub-s. 2, of the Sale of Goods Act, 1893, is that Pintscher should have "obtained" possession of the bill of lading with the consent of the sellers. It is not necessary that the possession should continue to be with their consent at the time of the transfer of the bill of lading by him. In the case of factors the determination of the consent is immaterial unless the person taking the disposition has notice of it. See Factors Act, 1889, s. 2, sub-s. 2.

In a case which comes within s. 25, sub-s. 2, of the Sale of Goods Act, 1893, there can be no right on the part of the unpaid vendor to stop the goods in transitu as against the bonâ fide transferee of the bill of lading for value. The intention of that sub-section is to give a good title to such a transferee, though his transferor had none; and it would to a great extent defeat that intention if in such a case the right of the vendor to stop in transitu should continue to exist. By s. 47 of the Sale of Goods Act, 1893, "subject to the provisions of this Act, the unpaid seller's right of lien, or retention, or stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto; provided that, where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention, or stoppage in transitu is defeated." The provisions of the operative part of this section are expressly made subject to the provisions of the Act; and by s. 25, sub-s. 2, this case is brought within the proviso. Sects. 10 and 11 of the Factors Act, 1889, shew what is meant by "lawfully transferred" in the proviso. Sect. 11 provides that for the purposes of the Act the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery or makes the goods deliverable to the bearer, then by delivery. "Lawfully transferred" only means transferred in the legal manner appropriate to the particular instrument. By s. 25,

sub-s. 2, of the Sale of Goods Act, 1893, the plaintiffs are placed in the position of a bonâ fide indorsee for value of a bill of lading to whom the property in the goods has passed. The unpaid vendor has no right as against such an indorsee to stop in transitu: *Lickbarrow* v. *Mason*. (1) There can be no right of stoppage in transitu in a case where the Factors Act applies. By s. 2, sub-s. 1, of the Factors Act, 1889, a disposition of the goods by a mercantile agent coming within that section is to be as valid as if expressly authorized by the owner of the goods. If Steinmann & Co. had expressly authorized Pintscher to transfer the bill of lading to the plaintiffs as sub-vendees of the goods upon payment of the price of the goods to him, they could not afterwards have stopped the goods in transitu. [He also cited *Jenkyns* v. *Usborne*. (2)]

Cohen, Q.C. (*H. Parker Lowe* with him), for the defendants. Pintscher did not obtain possession of the bill of lading with the consent of Steinmann & Co. within the meaning of s. 25, sub-s. 2, of the Sale of Goods Act, 1893. The language of that sub-section differs from that of sub-s. 1, which relates to a seller remaining in possession of goods or the documents of title to them. Sub-s. 1 of s. 25 gives a delivery or transfer of the goods or documents by such a seller the same effect as if authorized by the owner of the goods. Sub-s. 2 gives a delivery or transfer of the goods or documents of title under it the same effect as if the person making it were a mercantile agent in possession of the goods or documents with the consent of the owner. By s. 2, sub-s. 1, of the Factors Act, 1889, a sale or other disposition by a mercantile agent who is with the consent of the owner of goods in possession of the goods or documents of title to them is to be as valid as if expressly authorized by the owner of the goods; and by sub-s. 2, where the agent has, with the consent of the owner, been in possession of the goods or documents, the sale or other disposition is to be valid notwithstanding the determination of the consent, provided the person taking under the disposition has no notice of it. Here Pintscher never was in possession of the bill of lading with the consent of the

(1) (1787) 2 T. R. 63; (1790) 1 H. Bl. 357; 6 East, 20.
(2) (1844) 7 M. & G. 678.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

sellers within the meaning of those provisions. Steinmann & Co. never consented to its being in his custody, unless he accepted the bill of exchange which accompanied it. If he did not accept the bill of exchange, it was his duty immediately to return the bill of lading to Steinmann & Co. If a bill of lading and draft were sent by a messenger to a vendee of goods, and just handed by the former to the latter in order that he might accept the draft, there would be no change of the possession of the bill of lading with the consent of the vendors till he did so. It makes no difference that the documents are sent by post. The observations of Lord Westbury and Lord Cairns in *Shepherd* v. *Harrison* (1) are authorities to shew that in such a case as this the bill of lading cannot be considered as in the possession of the buyer of the goods with the consent of the seller until the bill of exchange is accepted.

Sect. 2, sub-s. 1, of the Factors Act, 1889, only applies to sales or other dispositions of goods made by a mercantile agent in possession of goods or the documents of title to them to a person who buys or takes on the faith of that possession: *Bonzi* v. *Stewart.* (2) Here the sale of the goods to the plaintiffs by Pintscher preceded the sending of the bill of lading to him by Steinmann & Co.

Assuming that s. 25, sub-s. 2, of the Sale of Goods Act, 1893, applies, it does not affect the right of the unpaid vendors to stop the goods in transitu. Apart from statute, the right of an unpaid vendor of goods to stop them in transitu was only defeated where the bill of lading had been indorsed to a bonâ fide indorsee for value by a purchaser to whom the property in the goods had passed. In the present case it is clear from the judgment of the House of Lords in *Shepherd* v. *Harrison* (1), and sub-ss. 2, 3 of s. 19 of the Sale of Goods Act, 1893, which merely embody the law as laid down in that case, that no property in the goods mentioned in the bill of lading passed to Pintscher, so that there could be no question, apart from statutory enactments, of defeating the right to stop in transitu. If s. 25, sub-s. 2, of the Sale of Goods Act, 1893, applies, the effect is that there is a valid disposition of the goods by Pintscher

(1) L. R. 5 H. L. 116. (2) (1842) 4 M. & G. 295.

to the plaintiffs, but it does not follow that that defeats the unpaid vendor's right of stoppage in transitu. The question still remains whether the provisions of the Sale of Goods Act, 1893, or of the Factors Acts have that effect. It is submitted that they have not. By s. 61, sub-s. 2, of the Sale of Goods Act, 1893, the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, are to continue to apply to contracts for the sale of goods. Therefore, so far as the common law with regard to stoppage in transitu is not excluded by the express terms of the Act, it continues in force. The provisions of s. 25, sub-s. 2, cannot be considered as expressly excluding the right of stoppage in transitu in cases that come within it. If the sub-section had that effect, the proviso to s. 47 would be unnecessary. There is no reference to the right of stoppage in transitu in terms in the sub-section, which there would have been, if it had been intended to affect it. There is nothing inconsistent with the right of an unpaid vendor to stop in transitu in s. 25, sub-s. 2, of the Sale of Goods Act, or in s. 2, sub-s. 1, of the Factors Act, 1889. Primâ facie the general scope of the Factors Act has nothing to do with stoppage in transitu. Sect. 2, sub-s. 1, of the Factors Act, 1889, has to do, not with the effect upon the right to stop in transitu of an indorsement or transfer of a bill of lading or other document of title to goods by a mercantile agent, but only with the validity of a sale or other disposition of the goods themselves made by a mercantile agent in possession of the goods or the documents of title to them. Sect. 9 of the Factors Act, 1889, is substantially to the same effect as s. 25, sub-s. 2, of the Sale of Goods Act, 1893. Their provisions merely put a buyer who obtains possession of the goods or documents of title to them with the seller's consent in the same position as a mercantile agent in possession of goods or the documents of title to them with the consent of the owner. The effect is that a sale or other disposition of the goods by such a buyer is valid; but it is not the sale or other disposition of the goods per se which at law defeats the right to stop in transitu, but the transfer of the bill of lading or other similar document. It is submitted that neither

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

the Sale of Goods Act, 1893, nor the Factors Act, 1889, says that in such a case the transfer or delivery of the document shall defeat the right to stop in transitu which according to the rules of the common law would otherwise exist. Sect. 47 of the Sale of Goods Act, 1893, and s. 10 of the Factors Act, 1889, which corresponds to the proviso to that section, do expressly refer to stoppage in transitu. It is submitted that, unless the unpaid vendor's right to stop in transitu is defeated by the provisions of s. 47 of the Sale of Goods Act, 1893, or those of s. 10 of the Factors Act, 1889, it is not affected by any provision of either of the Acts. This case does not come within the proviso to s. 47 of the Sale of Goods Act, 1893, or s. 10 of the Factors Act, 1889, for the bill of lading in this case cannot be said to have been "lawfully transferred" to Pintscher, as the property in the goods was not intended to pass to him till he accepted the draft, and moreover the transfer by him to the plaintiffs was not by way of sale, the sale having previously taken place. [He cited *Gurney* v. *Behrend* (1); *Burdick* v. *Sewell*. (2)]

Joseph Walton, Q.C., in reply. At common law of course, where the property in the goods had not passed from the vendor, no question of stoppage in transitu properly so called could arise, and, if the vendor stopped the goods, it was by virtue, not of the right to stop in transitu, but of ownership of the goods. No property in the goods really passed in this case to Pintscher, but in cases coming within s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and s. 9 of the Factors Act, 1889, the real facts are not to be looked at, but the case is to be dealt with on the statutory assumption, which is that the buyer under those provisions is a mercantile agent authorized by the seller to dispose of the goods by transfer or delivery of the goods or documents of title to them under a sale or other disposition thereof. Upon this statutory assumption no right of stoppage in transitu can remain in the seller. A delivery of the bill of lading does not necessarily pass the property in the goods, but it passes the constructive possession of them, and, if made under such circumstances that it would pass the property, if the person delivering it had the property, it amounts to a dis-

(1) (1854) 3 E. & B. 622. (2) (1884) 13 Q. B. D. 159.

position of the goods within the meaning of the Factors Act, 1889.

Cur. adv. vult.

March 8. A. L. SMITH L.J. read the following judgment—The question raised in this case is whether, when a seller of goods sends to his buyer under cover of a letter a bill of lading accompanied by a draft to be accepted by the buyer for the price of the goods contained in the bill of lading, the buyer can keep the bill of lading and refuse to accept the draft and yet give a good title to the goods covered by the bill of lading to a sub-purchaser from him who takes in good faith and without notice of the want of authority of the buyer to deal with the bill of lading and the goods represented thereby. If the question be answered in the affirmative, a further question as to stoppage in transitu will arise, which I will deal with hereafter.

Upon July 12, 1897, Steinmann & Co., of Liverpool, contracted to sell to Pintscher, of Altona, ten tons of copper to be delivered, c.i.f., at Rotterdam, payment to be made by Pintscher's acceptance at thirty days from date of bill of lading. On August 27, 1897, the plaintiffs, Cahn and Mayer, purchased of Pintscher ten tons of copper. Upon August 30, 1897, Steinmann & Co., in fulfilment of their contract with Pintscher, forwarded to him a bill of lading indorsed in blank for ten tons of copper, accompanied by a draft for his acceptance in the following letter: "Liverpool, August 30, 1897. Mr. M. D. Pintscher, Altona. Dear Sir,—We beg to confirm our respects of the 26th inst., and have the pleasure of handing you herewith bill of lading for ten tons R.T.C. ingots, shipped per ss. *Collier* to Rotterdam. We further hand you our invoice for these goods amounting to M.10,624 30, and our draft for the same amount, which be good enough to provide with your acceptance and return to us as soon as possible. Yours truly, R. Steinmann & Co." The draft contained in this letter was by mistake drawn for 10*l.* in excess of the contract price of the copper, but no point is made as to this. This letter, with its inclosures, reached Pintscher upon September 1, 1897, and he thereupon retained the bill of lading and handed it to his

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

A. L. Smith L.J.

banker to hand to the plaintiffs, and when they paid against the bill of lading, the banker was to credit the proceeds to Pintscher's account which was then in debit. Pintscher never accepted the draft. The banker on September 2, 1897, accordingly handed the bill of lading indorsed by Pintscher to the plaintiffs in fulfilment of their contract with Pintscher, and against this bill of lading the plaintiffs paid cash to the banker, taking it in good faith and without notice that Pintscher had no authority from Steinmann & Co. to deal with the bill of lading as he was doing. The banker credited the amount received from the plaintiffs to Pintscher's overdrawn account. Before the goods arrived at Rotterdam, Steinmann & Co. being unpaid for their copper and Pintscher having become insolvent, Steinmann & Co. stopped the copper in transitu. In these circumstances, are the plaintiffs entitled to the copper as against Steinmann & Co., the unpaid vendors? This depends upon the Sale of Goods Act, 1893, coupled with the Factors Act, 1889, which clearly must be read together, for without these Acts there can be no doubt that the plaintiffs took no title to the goods, and the learned judge has held that they did not, and the plaintiffs appeal.

That the Factors Acts, commencing as they do in the year 1823 (4 Geo. 4, c. 83), and finishing up with the Sale of Goods Act, 1893, were passed to afford protection to persons dealing in good faith and without notice with factors cannot be disputed, and that additional protection to persons so dealing, not only with factors, but also with buyers of goods, has by these Acts from time to time been afforded is equally clear; and the first question is whether the plaintiffs are within the protection of the last of these Acts—namely, the Sale of Goods Act, 1893—coupled with the Factors Act, 1889. I would point out that it is only in cases where an owner has in some way been deprived of his goods without his authority that the Factors Acts are required; for, if he is not so deprived, the Acts are not needed to protect bonâ fide transactions with agents and buyers.

By s. 25, sub-s. 2, of the Sale of Goods Act, 1893, it is enacted, "Where a person having bought or agreed to buy goods"—this embraces Pintscher—"obtains with the consent

of the seller"—this embraces Steinmann & Co.—"possession of the goods or the documents of title to the goods"—which undoubtedly comprises a bill of lading—"the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." By sub-s. 3 of this section the term "mercantile agent" has the same meaning as in the Factors Acts. It will be noticed that the important words of this section are, "obtains with the consent of the seller possession of the goods or the documents of title to the goods." I now turn to s. 2, sub-s. 1, of the Factors Act, 1889, to see what are the powers of a "mercantile agent." It is thereby enacted: "Where a mercantile agent is with the consent of the owner"—in this case, where Pintscher is with the consent of Steinmann & Co.—"in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." By s. 2, sub-s. 2, of this Act of 1889 it is enacted that "where a mercantile agent"—which includes a buyer—"has, with the consent of the owner, been in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition which would have been valid, if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined." By s. 1, sub-s. 2, of this Act of 1889 it is enacted that "a person shall be deemed to be in

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

A. L. Smith L.J.

possession of goods, or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf."

So it will be seen that in this case the first question comes to this—Did Pintscher obtain the actual custody of the bill of lading with the consent of Steinmann & Co.? For, if so, the plaintiffs can make title to the bill of lading and the goods under the above-mentioned Acts. No point is made as to whether Pintscher acted in the ordinary course of business of a mercantile agent when he parted with the bill of lading as he did to his banker. A point was made that, when the plaintiffs contracted with Pintscher to buy ten tons of copper, they did so before Pintscher had the custody of the bill of lading, and that the plaintiffs were not therefore protected by the Acts; for it was said that the sale was made by Pintscher to the plaintiffs before he was in possession of the document of title. But I think the answer to this argument is that s. 25, sub-s. 2, of the Sale of Goods Act, 1893, validates the delivery or transfer of a document of title, which took place in this case when Pintscher transferred the indorsed bill of lading through his banker to the plaintiffs, against which they paid their money. This point fails Steinmann & Co. That the bill of lading was in the actual custody of Pintscher is clear, though I agree that this does not suffice, for the statute enacts that the actual custody of the document of title must be obtained by the mercantile agent or buyer with the consent of the seller. Now the bill of lading was not obtained by Pintscher from Steinmann & Co. by any trick or device, in which case it could not, I think, be said that Pintscher had obtained the actual custody of it with Steinmann & Co.'s consent; but, on the contrary, the bill of lading, accompanied by the draft, was voluntarily sent by Steinmann & Co. to Pintscher, and it was by this voluntary act of Steinmann & Co. and by this alone that the bill of lading was obtained by Pintscher from them, and thus got into his "actual custody," which are the words of the Act. Why, then, was not the bill of lading obtained by Pintscher and in his actual custody with Steinmann & Co.'s consent?

The limitation of Pintscher's authority to deal with the bill of lading after he got it into his custody, before he accepted the draft, is not to the point, which as before stated is—Did Pintscher obtain the actual custody of it with the consent of Steinmann & Co.? In my judgment the words of the Act mean actual physical custody. After consideration, the only answer I can give to this question is that the bill of lading was obtained by Pintscher from Steinmann & Co. and was in his actual custody with Steinmann & Co.'s consent.

It is, however, argued that what Lords Westbury and Cairns said in *Shepherd* v. *Harrison* (1) shews that I am wrong, but I do not think so. What those noble and learned Lords were dealing with was the passing of property in goods contained in a bill of lading to a purchaser, he not accepting the draft accompanying the bill of lading. We have nothing to do in this case with the passing of property to Pintscher. That no property passed to Pintscher in the copper cannot be doubted, but this is not the question. Lord Westbury (2) said that, though it was not in writing, the meaning of the transaction was "Remember you are not to possess yourselves of the bill of lading until you have accepted the bill of exchange"; and Lord Cairns (3) said: "I do not believe there is a merchant in England that would have had any doubt that the meaning" (of sending the bill of lading and draft together) "was: You shall have the bill of lading when you accept the bill of exchange. . . . . I hold it to be perfectly clear that, when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and the bill of exchange are transmitted in a letter, either 'to approbate or to reprobate' entirely and completely, then and there. . . . I therefore think that, when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in inclosing these bills of lading and bills of exchange is, that, before you use the bills of lading, you shall accept the

(1) L. R. 5 H. L. 116. (2) L. R. 5 H. L. at p. 130.
(3) L. R. 5 H. L. at p. 132.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

A. L. Smith L.J.

bills of exchange." It seems to me that the noble and learned Lords clearly state that, before the draft is accepted, the buyer is not to use the bill of lading, and, if he does so, it is a clear breach of his duty to his seller, and in such circumstances no property passes to the buyer. But this does not cover the present question, which is, Did Pintscher obtain the actual custody of the bill of lading, that is of the thing itself, with Steinmann & Co.'s consent? The noble and learned Lords were not dealing with the effect of the Factors Acts, which was not before them, and with which they had nothing to do. I agree that it was Steinmann & Co.'s intention that Pintscher was not to use the bill of lading, unless and until he accepted the draft; but the bill of lading was none the less in Pintscher's actual custody with their consent before he had accepted the draft. The Legislature, when it passed the Sale of Goods Act, 1893, by s. 19, sub-s. 3, enacted what had been held by the House of Lords in *Shepherd* v. *Harrison* (1) and nothing more, the Act being an Act to codify the law.

I now come to the second question, raised in this Court for the first time, for it was not made in the Court below—that, supposing the plaintiffs had a good title to the bill of lading by virtue of the protection afforded to them by the conjoint operation of the Sale of Goods Act, 1893, and the Factors Act, 1889, Steinmann & Co. could, nevertheless, stop, as they did, the goods in transitu and thus defeat the plaintiffs' statutory title to the goods comprised in the bill of lading. I agree that this is an important point, for, if it be sound, the title to a bill of lading and the goods represented thereby, which a sub-purchaser in good faith takes from a buyer of the goods and obtains by reason of the provisions of the Act, will in many cases be invalidated. Now, what does s. 2, sub-s. 1, of the Act of 1889 enact? It enacts that, where a mercantile agent (which includes a buyer) is, with the consent of the owner, in the actual custody of goods or the documents of title to goods (which for this point must be taken to be the case), any disposition of the goods made by him shall, subject to the provisions of this Act, be as valid as if he were expressly authorized

(1) L. R. 5 H. L. 116.

by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same: in other words, as if the disposition had been made by the owner of the goods himself or by his lawfully authorized agent. By s. 10 of this Act it is enacted that, where a document of title to goods has been lawfully transferred to a person as a buyer (which was done in this case by Steinmann & Co. passing the indorsed bill of lading to Pintscher), and that person transfers the document to a person (the plaintiffs) who takes the document in good faith and for valuable consideration (as the plaintiffs did), the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu. What avail, then, is it to call attention to s. 61, sub-s. 2, of the Sale of Goods Act, 1893, which enacts that the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts for the sale of goods? For, in my judgment, the provisions of s. 2, sub-s. 1, and s. 10 of the Factors Act, 1889, which it is conceded must be read as part of the Act of 1893, expressly provide that, in circumstances such as exist in the present case, the right to stoppage in transitu is defeated. See also, as to this, the proviso to s. 47 of the Act of 1893, of which section the first part leaves the right of stoppage in transitu precisely where it was before upon the mere sale of goods, when no transfer of the bill of lading by indorsement takes place, and the proviso re-enacts s. 10 of the Factors Act, 1889. This second point, therefore, as to stoppage in transitu, also fails Steinmann & Co. For the reasons above I think that the appeal must be allowed.

COLLINS L.J. read the following judgment:—The crucial question in this case is whether Pintscher, the buyer, obtained possession of the bill of lading with the consent of Steinmann & Co., the sellers. If he did, his transfer of it for cash to

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

Collins L.J.

Cahn and Mayer, the sub-purchasers, who received the same in good faith, and without notice of any lien or other right of Steinmann & Co., was by s. 25, sub-s. 2, of the Sale of Goods Act, 1893, as effectual as if Pintscher had been a mercantile agent in possession of the bill of lading with the consent of the owner. Such a sale by a mercantile agent is, by s. 2, sub-s. 1, of the Factors Act, 1889, as valid as if he were expressly authorized by the owner to make it. It is to be noted that the words of s. 25, sub-s. 2, are "obtains possession" with the consent of the seller. It is therefore immaterial whether the consent was afterwards withdrawn. When he has once got possession by consent, his subsequent disposition of the bill of lading, whether such consent still subsists or not, is made as effectual as if he were in making the transfer a mercantile agent in possession with the consent of the owner. A mercantile agent is himself placed in a similar position by sub-s. 2 of s. 2 of the Factors Act, 1889. Where he has been in possession with consent, the determination of the consent does not, while he retains possession, defeat his disposition. "Possession" by the Factors Act, 1889, s. 1, sub-s. 2, means actual custody. The Factors Act, 1889, which is thus referred to, and as to part of it in terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to bonâ fide purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the bonâ fide purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner. But, if a mercantile agent, or one of the persons whose disposition is made as effectual as that of

a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines* v. *Swainson* (1); *Sheppard* v. *Union Bank of London* (2)), he is able to pass a good title to a bonâ fide purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Blackburn J. in *Cole* v. *North Western Bank*. (3) These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann & Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment. If he became criminally responsible for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking. He might conceivably have fully intended to accept the draft and forward it by the first post. If he had disposed of the bill of lading, while he remained in this attitude of mind, and subsequently accepted the draft, and forwarded it, and become insolvent before the transitus of the goods was over, could Steinmann & Co. have stopped them effectually on the ground that Pintscher had not obtained possession of the bill of lading with their consent? If not, it could only be because the original taking was with their consent. The possession, i.e., the actual custody, was obtained once for all when the bill of lading was placed in Pintscher's hand, and no subsequent changes in his intention with regard to the draft could change the character

(1) (1863) 4 B. & S. 270.
(2) (1862) 7 H. & N. 661.
(3) (1875) L. R. 10 C. P. 354, at p. 373.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

Collins L.J.

of this completed act. It would in my opinion defeat the purpose of the Act, and work a public mischief, if a vendor who had himself placed the bill of lading in the hands of his purchaser were entitled as against a bonâ fide sub-purchaser from the latter to enter into nice questions as to the intention with which the original purchaser took the document of title into his possession. The Legislature has deliberately chosen to alter the common law which made a transfer of a bill of lading ineffectual, if the person transferring was not himself the owner of the goods. It has step by step enlarged the class of persons who, having possession, may give a better title than they have themselves got, and has relaxed the conditions under which they may do so; and I think it would be a backward step to subject the title of the purchaser from such persons to speculations such as the argument for the defendants suggests. It is to be noted that s. 25, on which the question turns, and which makes possession obtained by consent the only condition of the buyer's power to sell again, follows immediately upon a series of sections dealing with transfers by persons without title, in the last of which the distinction of possession obtained under circumstances amounting to larceny from that obtained by fraud or other wrongful means not amounting to larceny is made the basis of an enactment. Read in this context, the section itself at once suggests the test of larceny, where the obtaining possession has been, as in this case, by direct delivery by the owner to the buyer. In *Phillips* v. *Huth* (1), decided upon the law as it stood before 5 & 6 Vict. c. 39, Parke B. in delivering the judgment of the Court says: "If the Legislature had intended to make the simple possession of such instruments sufficient to enable the party having them to make a good title, they no doubt would have so provided: if they had, the innocent party dealing with him would have been protected, but the innocent owner would in that case have suffered, if the document had been taken from him by felony or fraud: but by providing that a person should be intrusted, as well as in possession, the inconvenience is obviated." Though, as we have seen, the word "intrust"

(1) (1840) 6 M. & W. 573, at p. 597.

was afterwards held to be satisfied, although the intrusting was induced by fraud, I think the omission of this word in the present statute, and the substitution of "obtain with consent," must have been still further to improve the position of the purchaser from one of the class of persons dealt with in the Act, and at least to exclude all consideration of the conditions upon, or purposes for which actual possession was in fact voluntarily given to his vendor. In *Cole* v. *North Western Bank* (1) Blackburn J., in delivering the judgment of the Exchequer Chamber, says: "The Legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who bonâ fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell, or to procure the advance." In *Sanders* v. *Maclean* (2) Bowen L.J., in dealing with an objection that the usage there contended for would facilitate fraud, says: "The object of mercantile usages is to prevent the risk of insolvency not of fraud. . . . Credit, not distrust, is the basis of commercial dealings." The later legislation is clearly an attempt to bring the law more nearly into line with mercantile opinion, and to extend the statutory implication of misleading to the case where persons not agents at all have been permitted by the owner to obtain possession of goods or documents of title. In short the vendor who puts his purchaser in possession of the documents may be deemed to have misled the sub-purchaser who buys on the faith of that possession. The vendor from whom they have been stolen, or taken against his will, cannot. The common precaution of sending the bill of lading to his own agent instead of to the buyer direct would have avoided all difficulty, and I think the Legislature must have been well aware of the common practice in these cases, and left the seller to protect himself.

It is, however, contended by the respondents that s. 19, sub-s. 3, of the Sale of Goods Act, which enacts the law as laid

(1) L. R. 10 C. P. 354, at p. 372. (2) (1883) 11 Q. B. D. 327, at p. 343.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

Collins L.J.

down in *Shepherd* v. *Harrison* (1), concludes the case in their favour, and the learned judge below seems to have adopted this view. With the greatest respect for his opinion, I cannot think that section has any bearing on the point now under discussion. It is not addressed to the original obtaining possession of the bill of lading at all. It is addressed to the duty of the recipient after he has got it, and declares that, if he wrongfully retains it, the property in the goods does not pass. All this is wholly consistent with, and indeed assumes custody with consent. His possession becomes wrongful only if he does not honour the bill of exchange; then and only then he is bound to return the bill of lading. Even when by electing not to accept the bill of exchange he has come under a duty to return the bill of lading, he is bailee of the bill of lading for that purpose with the consent of the owner. But at what moment does his retention become wrongful? Suppose he bonâ fide intends to honour the bill of exchange, and lays both bill of lading and bill of exchange aside for an interval, while he is attending to other matters, is his possession during this interval without consent? At what point of time does he obtain possession with consent in case he makes up his mind to accept the bill? Surely the "obtaining" possession with consent cannot depend on the fluctuations which his mind goes through during the period that the bill is in his custody. But when *Shepherd* v. *Harrison* (1) itself is looked at, it is clear that the point there decided was quite outside the question of the possession as distinguished from the jus disponendi. The whole point was whether the true owner had shewn that he intended to reserve to himself the jus disponendi in the goods so as to negative the inference that the property in them had passed to the person to whom a bill of lading indorsed in blank had been handed by the owner's agent together with a bill of exchange for the price for acceptance. The handing over the bill of lading under such conditions clearly did not rebut the conclusive evidence from the transaction itself that the seller intended to preserve his jus disponendi until the acceptance of the bill of exchange, and that therefore no property in the goods passed to the plaintiff

(1) L. R. 5 H. L. 116.

by the delivery of the bill of lading. It was not a question what title the buyer, having no title himself, could pass to a bonâ fide purchaser, but whether he could make title against the seller himself, a point wholly outside the special legislation of these Acts which are based, as I have shewn, on a constructive misleading of third persons. The decision and the dicta are addressed to this point only. "I therefore think," says Lord Cairns (1), "that, when one merchant in this country sends to another under circumstances like the present a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: We require you to take notice that our object in inclosing these bills of lading and bills of exchange is that, before you use the bills of lading, you shall accept the bills of exchange." This is what he means when he says earlier in his speech: "The meaning of that was: You shall have the bill of lading when you accept the bill of exchange." The same meaning must be attributed to Lord Westbury's paraphrase: "Remember you are not to possess yourselves of the bill of lading until you have accepted the bill of exchange." Property, control, not mere actual custody, is what their Lordships are referring to. The statutory declaration of the buyer's duty, when he has got the bill of lading, could not, any more than a mandate actually given or implied by law out of the circumstances, undo, or defeat the effect of, possession given concurrently with the mandate. It is expressly provided by s. 21, sub-s. 2, that nothing in the Sale of Goods Act shall affect the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. If therefore there was possession with consent here under the Factors Act, this provision would not suffice to defeat it. But for the reasons I have given I think it leaves the law precisely as it was, and has no bearing on the discussion. On the principal point in the case therefore I think the appellants are right.

It remains only to deal with Mr. Cohen's argument that, even on the assumption that Pintscher obtained possession of the bill of lading with the consent of Steinmann & Co., his

(1) L. R. 5 H. L. at p. 133.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

Collins L.J.

transfer of it to Cahn and Mayer did not suffice to defeat the right of Steinmann & Co. to stop in transitu. He relied on s. 61 of the Sale of Goods Act, which preserves the rules of the law merchant save in so far as they are inconsistent with the Act, and pointed out that, apart from the Factors Acts, a transfer such as that made by Pintscher, having himself no property in the bill of lading, would not have defeated the unpaid vendor's right to stop. But that Mr. Cohen pressed this point upon us I should have thought it unarguable. The law merchant has unquestionably been altered by this Act, which partly re-enacts and partly applies the existing Factors Act. Sect. 21, sub-s. 2 (*a*), expressly enacts that "nothing in this Act shall affect the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof." The effect of this legislation therefore has been to enable a buyer who has obtained possession of the bill of lading with the consent of the owner to deal with it as effectually as he might have done before if he had had property as well as possession. By s. 25, sub-s. 2, his transfer is made as effectual as if he were a mercantile agent in possession of the goods or documents with the consent of the owner; and by s. 2, sub-s. 1, of the Factors Act, 1889, a disposition of the goods by a mercantile agent under such circumstances is "as valid as if he were expressly authorized by the owner of the goods to make the same." I have no hesitation in holding that a transfer of the bill of lading is a disposition of the goods within the meaning of those words in this section. But Mr. Cohen then fell back on s. 47 of the Sale of Goods Act, and said that that section now defines the only terms under which a buyer may defeat the right to stop in transitu by a sub-sale, and that this case does not fall within them. But the opening words of this section would be sufficient to introduce the Factors Act legislation into this enactment even if it had not been otherwise expressly preserved. They are: "'subject to the provisions of this Act' the unpaid seller's right of . . . . stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto."

It then provides that, "where a document of title to goods has been lawfully transferred to any person as buyer or owner" he may defeat the right to stop by a transfer of the document to a person who takes it in good faith and for valuable consideration. Mr. Cohen contended that in this case the bill of lading had not been "lawfully transferred" to Pintscher as buyer, inasmuch as it was not intended that the property should pass. But by s. 11 of the Factors Act, 1889, "The transfer of a document may be by indorsement, or where the document is by custom, or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery." "Delivery" by the Sale of Goods Act, s. 62, means "voluntary transfer of possession from one person to another." I think there can be no doubt whatever that the bill of lading, which was indorsed in blank, was in this case lawfully transferred to Pintscher as buyer. It would indeed be a strange result of this legislation if the transfer of a bill of lading by a buyer to a sub-purchaser under the statutory conditions were ineffectual to defeat the vendor's rights in the case where such transfers are most likely to take place, namely, while the goods are still in transit.

The result is that all Mr. Cohen's points fail. I have dealt with the case throughout upon the same footing as that upon which it was dealt with in the Court below, namely, as though the transfer of the bill of lading was from Pintscher to Cahn and Mayer direct. No point was made before us upon any other hypothesis. As to the point that there had been a bargain made by Pintscher with Cahn and Mayer before the former got possession of the bill of lading, the answer is that Cahn and Mayer's title rests on the transfer of the bill of lading for cash, and not on the prior bargain.

I think that the appellants are entitled to judgment.

ROMER L.J. read the following judgment:—Sect. 25, sub-s. 2, of the Sale of Goods Act, 1893, applies if Pintscher obtained possession of the bill of lading with the consent of Steinmann & Co. Now "possession" in that context means, I think, "actual custody." See the definition of "possession" in the

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

Romer L.J.

Factors Act, 1889, s. 1. The question therefore becomes narrowed to one of consent. On that question I have come to the conclusion that Steinmann & Co. did consent to Pintscher obtaining the custody of the bill of lading. No doubt Steinmann & Co. contemplated that Pintscher would, on receipt of the bill of lading, accept the bill of exchange drawn for the price of the goods; and, when Pintscher declined to accept the bill of exchange, he ought not to have dealt with the bill of lading. But I do not think that this is a case where the owners of the bill of lading made it a condition precedent to its custody being obtained by Pintscher that the bill of exchange should be accepted, so that, if the bill of exchange was not accepted, it was not the intention of Steinmann & Co. that Pintscher should obtain the custody of the bill of lading. I think the circumstances negative that view. It appears to me that Steinmann & Co. did intend and consent that the bill of lading and the bill of exchange should both come into the actual custody of Pintscher, though, after Pintscher obtained that custody, he had certain duties to discharge as between him and Steinmann & Co. with regard to both documents. Steinmann & Co., in short, consented that Pintscher should obtain the custody of the bill of lading, though they did not consent that Pintscher should use the bill of lading after it came into his custody before accepting the bill of exchange. See the observations of Lord Cairns in *Shepherd* v. *Harrison*. (1) It follows that Pintscher was for the purposes of this case in the position of a mercantile agent having possession of the bill of lading with the consent of the owner, and accordingly s. 2 of the Factors Act, 1889, applies, and the plaintiffs Cahn and Mayer obtained a good title to the goods; for under the circumstances of this case it cannot in my opinion be successfully contended by Steinmann & Co. that the transaction between Pintscher and Cahn and Mayer was not a disposition of the goods within the meaning of that phrase as used in s. 2, sub-s. 1, of the last-named Act.

With regard to the second point argued before us, which relates to the right of stoppage in transitu, I do not desire to

(1) L. R. 5 H. L. 116, at p. 133.

add anything to what the other members of the Court have already said.

C. A. 1899

CAHN v. POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY.

Appeal allowed.

Solicitors for plaintiffs: *Richard White, for E. M. Clason Dähne, Swansea.*

Solicitors for defendants: *Woodcock, Ryland & Parker, for Forshaw & Hawkins, Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1899 *Feb.* 16.

CARTWRIGHT, APPELLANT; THE GUARDIANS OF THE POOR OF THE SCULCOATES UNION, RESPONDENTS.

Poor-rate—Rateable Value—Public-house—Evidence of advantageous Situation and Business done—6 & 7 *Will.* 4, *c.* 96, *s.* 1.

On an appeal by the occupier against an assessment of a public-house to a poor-rate, an arbitrator, to whom the case was referred, and whose award was to be published in the form of a special case, found that the rents actually paid for other public-houses in the district furnished no criterion of the rent which would be paid for the appellant's house. He rejected evidence, which the respondents desired to give, by cross-examination of the appellant, of the amount of the weekly takings, but he admitted evidence as to the largeness of the business actually done, and as to the advantageous situation of the house for carrying on business:—

Held, affirming the judgment of the Divisional Court, that, the ordinary method of arriving at a valuation by comparison with the market value of other public-houses not being available, the method of arriving at the valuation of this house adopted by the arbitrator was correct.

Dodds v. *South Shields Union*, [1895] 2 Q. B. 133, distinguished.

APPEAL from a judgment of a Divisional Court on the special case set out below, stated by an arbitrator, by agreement and pursuant to a judge's order, upon an appeal to quarter sessions against an assessment to a poor-rate for the parish of Newington in the respondent union.

1. The appellant was rated as the occupier of the Star and Garter public-house, at 850*l.* gross estimated rental and 680*l.*

C.A. 1899

CARTWRIGHT v. SCULCOATES UNION.

rateable value, and appealed on the ground that he was overrated.

2. The premises are a fully licensed public-house, situated at the corner of two streets, called West Dock Avenue and Hessle Road, in the city and county of Kingston-upon-Hull, in both of which streets there is a great deal of traffic passing to and fro.

3. The Hull Brewery Company, Limited, are the owners of the premises, and the appellant is the tenant thereof, at a yearly rent of 250*l.*, under an agreement terminable by either party on giving three calendar months' notice, expiring at any time. The appellant has been the occupier of the premises for about nineteen years.

4. The public-house is tied, that is to say, the tenant is bound to purchase all liquors sold by him from the landlords, or from their nominees.

5. I find as a fact that the rent which the tenant of a tied public-house actually pays to his landlord is always less than the rent which the same tenant might reasonably be expected to pay for the same public-house if it were not so tied; but that the difference between the two rents is so uncertain in amount and so difficult to estimate, in the absence of evidence as to the trade actually done on the premises, that the rent actually paid for a tied public-house is (in my judgment) very untrustworthy evidence of the rent which might be expected to be paid for the same public-house if it were not so tied.

6. It was admitted before me that the existence of the licence, under which the public-house is occupied as such, materially increased the rent which any tenant would be willing to pay for the public-house, and I find as a fact that such increase in rent is caused by the possibility of carrying on a profitable trade which cannot be carried on on premises which are not so licensed.

7. The premises have been used as a fully licensed public-house for many years, and I find as a fact that it would be unreasonable to expect that any tenant, in considering what rent he would pay for the premises, would leave out of consideration the fact that the premises had been so used; and I

further find that any tenant wishing to occupy the premises as a fully licensed public-house might reasonably be expected to give a higher rent because the premises had already been so used for many years.

8. Evidence was given before me on behalf of the appellant to prove the existence of "goodwill" in connection with the business done by the appellant on the premises. If by "goodwill" is meant a personal connection between the appellant and his customers of such a character that, if the appellant were to cease to occupy the premises and were to remove into another fully-licensed public-house and carry on business there, he would be able to attract thither some of those customers, then I find as a fact that no such "goodwill" exists, or that if it exists it is of inappreciable value. If by "goodwill" is meant the probability that the customers now resorting to the premises will continue to do so whether the appellant continues to occupy the premises or not, then I find as a fact that such "goodwill" exists, and is of considerable value.

9. I find as a fact that if the appellant were to cease to occupy the premises, and were to become the occupier of and carry on business in any other fully-licensed public-house in Kingston-upon-Hull, any ordinary tenant carrying on business with ordinary skill and care might reasonably be expected to do the same trade and make the same profits in the premises as have hitherto been done and made therein by the appellant, and any such tenant might reasonably be expected to give the same rent for the premises as the appellant might be expected to give.

10. At the hearing before me, counsel for the respondents proposed by cross-examination of the appellant to give evidence of the amount of the appellant's weekly takings in his public-house. The appellant's counsel objected to the reception of the evidence, and relied on the decision of the Court of Appeal in *Dodds* v. *South Shields Union*. (1) It was submitted on behalf of the respondents that the appellant's public-house was an exceptional case, in exceptional circumstances, and that the rule laid down by the decision of the Court of Appeal did not

(1) [1895] 2 Q. B. 133.

C. A. 1899

CARTWRIGHT v. SCULCOATES UNION.

apply to such a case. I rejected the evidence on the authority of the case above cited, and I further hold that the public-house is not "an exceptional case" or "in exceptional circumstances" within the meaning of the judgments of the Court of Appeal in that case, unless it is so by reason of the facts herein found.

11. I find as a fact that the premises occupy a very good position for the purpose of trade, and a better position than any other public-house in the neighbourhood: that nearly all the public-houses in Kingston-upon-Hull are tied houses: that the public-houses in Kingston-upon-Hull which are not tied are of so little value and so far from the appellant's premises that the rents actually paid for such public-houses furnish no accurate criterion of the rent which a tenant might reasonably be expected to pay for the appellant's premises.

12. I find as a fact that any person desiring to become a tenant of the appellant's premises in order to occupy them as a public-house would endeavour to ascertain the trade actually done thereon, by reference to the weekly or yearly takings, or otherwise, before deciding what rent he would pay.

13. I find as a fact that, although it is clear that the appellant's premises occupy a better position than any other public-house in the neighbourhood, it is not possible to ascertain with any approximation to accuracy how much better the position of the appellant's premises is, and how much more rent a tenant might reasonably be expected to pay for such premises, without ascertaining the trade actually done thereon.

14. The respondents' witnesses estimated the trade actually done upon the appellant's premises, and then, by means of several rules of thumb or otherwise, estimated the rent which a tenant might reasonably be expected to pay for premises on which such a trade had actually been carried on.

15. The appellant contended—

(1.) That in valuing the public-house for the purpose of the poor-rate, the existence of the licence must be left out of consideration, on the ground that the licence is a personal privilege granted to the occupier, and does not increase the value of the hereditament itself.

(2.) That if the foregoing contention is wrong, the public-house should be valued without reference to the goodwill and the trade already done there.

16. The respondents contended—

(1.) That the evidence referred to in paragraph 10 was wrongly rejected.

(2.) That, if such evidence was rightly rejected, the rent which a tenant might reasonably be expected to pay for the appellant's premises, taking into account the trade already done there, was sufficient to support the assessment appealed against.

(3.) That in valuing for the purposes of the poor-rate it was right to take into account the existence of such trade.

(4.) That there was no personal goodwill in connection with the trade done upon the premises.

17. I hold that the first contention of the appellant is wrong in law. If I am wrong in so holding, then I find as a fact that the assessment appealed against should be reduced to 240*l.* gross estimated rental and 192*l.* rateable value; and I direct that all costs which are in my discretion shall be paid by the respondents to the appellant.

18. I hold that the second contention of the appellant is wrong in law. If I am wrong in so holding, then I find as a fact that the assessment appealed against should be reduced to 680*l.* gross estimated rental and 544*l.* rateable value; and I direct that all costs which are in my discretion shall be paid by the respondents to the appellant.

19. If I was wrong in rejecting the evidence referred to in the first contention of the respondents, then the Court is either to remit the case to me for further consideration or to make such other order as it shall think fit.

20. I find that the second contention of the respondents is true in fact, and in arriving at this conclusion I have taken into account the value of the "goodwill," using that word as bearing the second meaning stated in paragraph 8; and I order that the appeal shall be dismissed, and that all costs which are in my discretion shall be paid by the appellant to the respondents.

C. A. 1899

CARTWRIGHT v. SCULCOATES UNION.

21. I hold that the third contention of the respondents is correct; and I further hold that although the profits of trade (as such) cannot be rated, yet in estimating the rateable value of a public-house, if the ability to carry on a gainful trade therein adds to the value of such public-house, that value cannot be excluded merely because it is referable to the trade; and I consider that I am warranted in so holding by the decision of the Queen's Bench in *Reg.* v. *Grand Junction Ry. Co.* (1)

The Queen's Bench Division (Grantham and Ridley JJ.) gave judgment for the respondents.

The appellant Cartwright appealed.

Balfour Browne, Q.C., and *Cautley*, for the appellant. The only thing on which the appellant is rateable is rent, and that must be ascertained by the market value of the like premises in the neighbourhood. The arbitrator has in fact included something which is termed "goodwill"—that is to say, he has included the profits of the trade carried on. These profits depend on the personal qualities of the occupier and cannot be taken into account, as the letting value of the premises is independent of such personal considerations. The Divisional Court appear to have drawn a distinction between "trade actually done" and "trade already done"; but in fact there is no distinction, and the arbitrator in finding that the second contention of the respondent is right has taken profits into consideration. The circumstances said to make this case exceptional do not support that contention, and *Dodds* v. *South Shields Union* (2) is applicable to this case.

[They cited *Mersey Docks* v. *Liverpool* (3); *West Middlesex Waterworks Co.* v. *Coleman* (4); *London County Council* v. *City of London Brewery Co.* (5); *Bradford-on-Avon Assessment Committee* v. *White.* (6)

Bray, Q.C. (*R. Cunningham Glen* with him), for the respondents. The arbitrator has taken into consideration the position

(1) (1844) 4 Q. B. 18.
(2) [1895] 2 Q. B. 133.
(3) (1873) L. R. 9 Q. B. 84.
(4) (1885) 14 Q. B. D. 529.
(5) [1898] 1 Q. B. 387.
(6) [1898] 2 Q. B. 630.

and character of the house, as he was entitled to do: *Reg.* v. *Grand Junction Ry. Co.* (1); and the fact that it was an established house, to which, as appears by paragraph 7 of the case, the expression "trade already done" refers.

[He was stopped.]

EARL OF HALSBURY L.C. I am of opinion that this appeal must be dismissed. The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered. There has been a series of decisions with which I do not mean to quarrel, but I think this general observation might be made about them: that sometimes, in giving advice and directions to the justices in quarter sessions, before whom this question more commonly, and almost invariably, comes, phrases have been used by learned judges which might seem at first sight to be decisions upon the law of evidence, though I think it would be a mistake so to consider them. They are rules (if they may be called rules) which the Courts have given as advice to the justices in considering what should and what should not form topics for their consideration, and the mode by which those topics should be brought before them. I should hesitate, speaking generally, to assume that when it has been said that this or that is not evidence on such a question, it was intended to express by that, that according to the ordinary rules of evidence, such and such a topic might not be approached. Very often the judgment comes before the Court upon a case reserved by the sessions, which asks practically for advice in what way the problem is to be solved; and it is intelligible enough that under those circumstances the judges, in giving the advice and the decision at which they ultimately arrive, should have used phrases of the kind that I have referred to. They are not intended to be laid down as abstract propositions on the law of evidence, but as applicable to the subject-matter in hand, and

(1) 4 Q. B. 18.

C. A. 1899

CARTWRIGHT v. SCULCOATES UNION.

Earl of Halsbury L.C.

as advice as to the mode in which such and such a fact is to be ascertained. Nothing could be more appropriate to a consideration of that character than to point out to the justices that they should not allow, for instance, a roving commission over a man's books, in the nature of an income-tax commissioner's, to find out what he is making. That would be, I should say, inexpedient, and I think (the late Master of the Rolls uses the phrase) that it would be mischievous and oppressive. In that sense those decisions to which I have referred are very good and sound sense. Fortunately, it is not necessary to consider the effect of those decisions here as if they were to be treated as absolute decisions on the question of what is the law of evidence in this country; because in this case, in accordance with all the evidence which has been given, and in pursuance, as I think, of a long line of decisions on this question, the evidence here was properly received—such evidence as there was—and properly acted upon by the arbitrator. I am not aware that, as one test in ascertaining whether a house is capable of doing a good business or not, it would be inappropriate, whether it is a public-house or a shop of any other kind, that somebody or another should be called as a witness to say, "I saw every day the house quite full of customers." There is no decision which to my mind justifies the proposition that that would not be legitimate evidence. It would be to my mind one of the most extraordinary things in the world if you could give expert evidence that such and such a house would be likely to command such and such a business, and yet not be able to verify that a priori opinion by proof of the fact that it did command such a business. That is a totally different proposition from saying that you can go into a question of profit and loss, and ascertain whether a man has made so much money by conducting the business in the house. So, here, whether the evidence tendered is that a great number of persons brought drays of beer from time to time to this house, or that a great number of people were in the house drinking—both those topics of inquiry seem to me to point to the same thing, that it was a good house for business. It is not ascertaining the exact quantity of business done, but whether it is a good house for

business, and, as you want to know whether such and such a rent is appropriate, it is legitimate evidence to ascertain whether it is a good house for business or not.

That I think would be the law, quite independently of *Dodds* v. *South Shields Union* (1), upon which reliance has been placed; but if I am to take the strictest view of that case as applicable to the question now under debate, it appears to me that the arbitrator has in terms found that it is not applicable. Because what was there said was this: where there are no exceptional or peculiar circumstances, and where you can ascertain what is the rateable value of a house by looking at the houses next door, or houses similarly situated in the immediate neighbourhood, you have no right to go—and again I say those words have to be reasonably understood with reference to the canon of construction to which I referred just now—you have no right to go into a man's profit or loss, to look at his books, and so on. You must take the ordinary case of the market value of a house such as this, or of other houses similarly situated in the neighbourhood; and if you have those materials you have no right to go beyond them. That is all that case decided; but the Court said—in the case of a railway refreshment-room and in the case of the racecourse—where you have not the same power of comparing one subject of rating with another, you must, of necessity, go into the question more minutely and find out what money can be made out of it. That is the effect of the decision. Now, what does the arbitrator say here? He may be right or he may be wrong as a matter of fact, but he says he cannot find out the proper rateable value from materials of that character; the houses are so far apart; free houses are so few; they are in such distant parts of the neighbourhood with which he is dealing, that he cannot find that out unless he is entitled to consider the amount of business. Is it possible to contend, in the face of this specific finding, that this is not within the exception recognised in *Dodds* v. *South Shields Union*? (1) It seems to me to be hopeless, and, under those circumstances, therefore, it appears to me that the arbitrator has very properly considered that this

(1) [1895] 2 Q. B. 133.

C. A. 1899

CARTWRIGHT v. SCULCOATES UNION.

Earl of Halsbury L.C.

was a house which would probably do a certain amount of business—the exact amount is not before us—and that the rateable value which he has affixed to this house is the rateable value which he has fixed on taking into consideration all the circumstances of this case.

I have listened with some curiosity, I admit, to know what explanation was to be given of the difference between "the business actually done" and "the business already done"; and I must say, notwithstanding Mr. Bray's conveying to me some degree of appreciation of what somebody might or may have meant, I cannot at this moment say that I have a very clear notion of what is the difference between the actual business and the business done. It is one of those problems which I must be satisfied with being unable to solve at the moment.

However, the result is that I am of opinion that this appeal should be dismissed. I think the arbitrator has properly arrived at a conclusion at which he was entitled to arrive. So far as the quantity is concerned, that question is not before us, but only whether he was entitled to arrive at the conclusion he has done on the materials he has enumerated as the materials upon which he formed his judgment.

A. L. SMITH L.J. I also am of opinion that this appeal fails. The case may be looked at from two aspects: one is that it is not an exceptional case, and the other is that it is an exceptional case, and different considerations apply to the one or the other. Take the case, first of all, on the ground that it is not an exceptional case—that there is nothing peculiar in the case at all: the question is what would a hypothetical tenant from year to year be likely to pay for a house similar to this public-house in Hull.

Now, as I have said before and I say again, primâ facie, the evidence which is given to prove the annual value of a public-house, and what rent it would command, is given by experts who know the locality, who know the situation of the house in question, who know the neighbourhood, who know the population. An expert says, "In my judgment, a hypothetical tenant would reasonably give as tenant from year to year, (say)

100*l.*, for the house." He says, and he is entitled to say, a tenant would give 100*l.* a year for that house, because it is in close contiguity to the dock gates. He would say it would carry that rental, although it might be a very small house. He is entitled also to say this: "I know the locality perfectly well, and I know that the house being in the neighbourhood of the dock gates it is full from morning to night as long as it is open. I see there are men in and out of that house all the hours that it is open." This is legitimate evidence to shew that it is a house capable of carrying on a good trade; and it fortifies his evidence as to its annual value, that it is carrying on a good trade, because he sees such and such things going on every day to his own knowledge. Why is not that evidence? It is not opposed to anything that we decided in *Dodds* v. *South Shields Union*. (1) What we decided there was this. The rating authority had put up the rateable value of a public-house, and on appeal they proposed to shew what were the average weekly takings and thus what profit the publican was making out of the house. We said that was not an exceptional case and excluded this evidence. I think, taking this case on the first hypothesis as not being an exceptional case, the evidence which was received by the learned arbitrator was admissible. It was not as to the details of the custom or items of money produced by the custom, but it was only to shew that there was a large trade going on and that the house was in a good position to command a good trade, and therefore the hypothetical tenant would give more than he otherwise would. It seems to me, however, that the learned arbitrator has found that this is an exceptional case. I need not go into the paragraph; there are three paragraphs to be read together. If it is an exceptional case, then there are authorities, which are referred to in *Dodds* v. *South Shields Union* (1), that if you cannot get at the annual value in the ordinary way by calling an expert and comparing the hereditaments proposed to be rated with some hereditaments in the neighbourhood—I am not sure whether you can go to the next town or not—so as to get at some sort of comparison, as in the racecourse case

(1) [1895] 2 Q. B. 133.

C. A. 1899

CARTWRIGHT v. SCULCOATES UNION.

A. L. Smith L.J.

and in the refreshment-room case, you must get at the value somehow. Then the only resource you have is to get at what trade is being done, so that you can calculate in some way what the hypothetical tenant would be likely to give for having the opportunity of carrying on business there. Whichever way this case is looked at, the appeal fails and must be dismissed.

COLLINS L.J. I am of the same opinion. I think when *Mersey Docks* v. *Liverpool* (1), which Lord Esher M.R. said was the foundation of all the subsequent decisions, is looked at, it merely is a decision that profits are not to be rated. Then comes the explanation of why they are not to be rated, and in that explanation, given by Blackburn J., I find the authority for what has been done in this case. This is what he says about it (2): "Though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business." If the evidence is used and applied under proper direction for that purpose, this is an authority that it is clearly admissible.

It seems to me that this rule as to what evidence is admissible, and what not admissible, is really a rule of convenience. The principle at the bottom of our law of evidence is simply, I think, a principle of convenience. We exclude a great many elements that might affect the judgment of ordinary persons, because, as a matter of convenience, it would be impossible to sift and examine and qualify all those different elements of evidence so as to give them their exactly adjusted position in the investigation. It is not practicable, and therefore we do not do it. Therefore we make the rule to admit the best evidence, and not the second best evidence. But in a great many given cases, that which I call the second best evidence is the most direct evidence on the matter; and, as a matter

(1) L. R. 9 Q. B. 84.

(2) L. R. 9 Q. B. 84, at p. 97.

of practice, it is an ordinary accepted rule, as the late Master of the Rolls says, that, in dealing with the rateable value of inhabited houses as ordinary business premises, you may determine the question by inquiring what rent is given for similar premises in similar positions in the same place. It is obvious where you have a simple standard like that ready to your hand, it is undesirable to embark upon an investigation as to the special circumstances in which the individuals occupying those particular houses carried on their work. Although it would be wrong to say that, as a matter of law, such an inquiry is to be excluded because it will have no bearing, still it is right to say that as a matter of convenience its bearing is subject to so much discussion and to so many qualifications that it is much better as a general rule of convenience to reject that class of evidence, and take that which is ready to hand and is so easily applied. I do not think the decision in *Dodds* v. *South Shields Union* (1) goes beyond that. It seems to me that to say that, as a matter of law, one is to shut one's eyes to that which must be a factor, if not the dominant factor, in governing the decision of any would-be tenant, namely, what possibility there is of making profits out of the hereditament, would be to shut one's eyes to the purpose for which evidence is admissible. It seems to me in this case, when you exclude altogether the profits actually made, but admit evidence as to the special facilities incident to this particular hereditament, that you are simply seeking to get at the most obvious and important factor in determining the intention of the tenant whether he would or would not give a certain rent for those premises. The facilities incident to the hereditament itself are absolutely germane to the matter. One way of arriving at these facilities —probably the best way—is to inquire how far they have been efficacious in the past. What inference are we to draw from what we know, as to what business can be done on those premises by an ordinary tenant? Surely the business that has been done is the most important factor in arriving at a conclusion. Of course, it has to be qualified by any special circumstances. When I take the findings of the arbitrator on the

(1) [1895] 2 Q. B. 133.

C. A. 1899

CARTWRIGHT v. SCULCOATES UNION.

Collins L.J.

whole of this case—although I think, if I may say so, he has left something to be desired in the way in which he expresses them—I think he does not mean to include anything more than that. In paragraph 21 he states clearly what I consider to be the proper standard to be applied, and if the case had stood there I should have had no difficulty about it. But he has taken the trouble to make some specific findings about goodwill which gave me some difficulty as to whether he had not made the goodwill itself the subject-matter of added value to this rateable hereditament. If he did so I think it was wrong; but looking at the 21st finding, which comes as the final and as it were effective summing-up of his view, I think it is intended to exclude, and does exclude, the goodwill as itself an element in the rateable value of the hereditament. For these reasons, I agree with the judgment that has been given by the Divisional Court.

Appeal dismissed.

Solicitors for appellant: *Rollit & Sons, for Rollit & Sons, Hull.*

Solicitor for respondents: *J. W. Sykes, for Chatham & Son, Hull.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 2.

ALLEN AND OTHERS, APPELLANTS; THE VESTRY OF THE PARISH OF FULHAM, RESPONDENTS.

Metropolis — Management — "New Street" — Paving Expenses — Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.

A road was made through agricultural land in the year 1877, under statutory powers. The statute provided that when the road was completed it should be a public highway of the parish, and repairable in like manner as any other highway of the parish should from time to time be repairable. The road was accordingly taken over and the carriage-way kept in repair by the local authority. No houses were built adjoining the road until 1890, when houses were erected on one side. In 1896 houses were erected on the other side of the road, and the local authority declared the road to be a new street, directed that it should be paved, and apportioned the estimated expense between the appellants and other frontagers. The appellants were summoned for non-payment of their contributions. The magistrate who heard the summonses found as a fact that the road became a new street for the first time after the erection of houses therein. On a case stated :—

Held, that s. 105 of the Metropolis Management Act, 1855, as amended by s. 77 of the Metropolis Management Act, 1862, had not the effect of making the road a new street on its construction in 1877; that the magistrate was justified in finding that it became a new street for the first time after the erection of houses therein; and that the local authority had power to pave it and to apportion the estimated expense between the frontagers.

APPEAL from a judgment of a Divisional Court on a case stated by a metropolitan police magistrate.

The appellants were the owners of certain premises forming, bounding, and abutting on Wandsworth Bridge Road. The respondents were the successors of the Fulham District Board of Works, and were invested with all such powers and subjected to all such provisions as if they had been named in Part II. of Sched. A of the Metropolis Management Act, 1855.

Wandsworth Bridge Road was made by the Wandsworth Bridge Company under statutory powers as a means of approach to the bridge, and it was provided by the statute that when the

C. A. 1899

ALLEN v. FULHAM VESTRY.

road was completed it should be a public highway and one of the parish highways of Fulham, and repairable in like manner as any other highway of that parish from time to time should be repairable.

The road was made in 1873 through agricultural land used as market gardens. The company applied to the district board to take over the maintenance and repair of the road. The road, however, having been made so inefficiently by the company as to be dangerous, the board declined to accept the charge of the road until it was completely channelled, kerbed, and paved, and the carriage-way properly made up and drained. After protracted negotiations and litigation between the company and the board, the company finally admitted their liability for the better completion and repair of the road, but repudiated liability for channelling and kerbing. At that date the methods of road-making and road repair were less elaborate, especially as regards new streets, than they have since become, and in the parish of Fulham there was little practical difference in the treatment in these respects applied to mere highways, as distinguished from streets formed by houses, and streets in the latter sense whether new or old.

Ultimately it was agreed that the company should pay a sum of 1750*l.*, and that the board should complete the road and undertake the liability of repairing it, and that the company should be exonerated from all further responsibility. In 1877 the board made up the carriage-way of the road with flints rolled in over a foundation of hard core. This was the method then adopted universally throughout the parish in the case of highways not being house-built streets. In the case of the latter the same method of making up was often adopted where the traffic was light; but where the traffic was comparatively heavy they were made up with granite—that is, they were macadamised. The carriage-way was subsequently repaired at intervals by the local authority down to the year 1897. No channelling or kerbing was done, and practically nothing in the way of making up was done to the footways. The magistrate found that except for the omitted channelling and kerbing the carriageway was made up and repaired in a permanent manner, and in the same

mode and to the same extent as new streets with a similar amount of traffic were dealt with at that period under the 105th section.

There were no buildings upon the land adjoining the road until the year 1890. In that year houses were erected on one side; but none were erected on the other side until the years 1895 and 1896, when houses were built on that side also. The Fulham Vestry in 1897 resolved that the road, being a new street, should be paved under the provisions of the Metropolis Management Acts, 1855, 1862, that the surveyor's plans and estimates should be adopted, and that the estimated costs of the paving works should be apportioned upon the owners of the houses and lands abutting upon the street. This was accordingly done, and the appellants made default in payment of the amounts apportioned upon them, and summonses were issued. The magistrate found that the road was not in 1877 a new street within the meaning of s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Act, 1862, and that it became a new street for the first time after the erection of houses therein, and was a new street within the meaning of the Acts when the resolution of the vestry was passed. He accordingly ordered the appellants to pay to the vestry the sums mentioned in the summonses, but stated a case for the opinion of the Court.

A Divisional Court (Day and Ridley JJ.) gave judgment for the respondents.

The appellants appealed.

Macmorran, Q.C., and *R. Cunningham Glen*, for the appellants. The definition of the word "street," in s. 250 of the Metropolis Management Act, 1855, is that it "shall apply to and include any highway (except the carriage-way of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage." By s. 112 of the Metropolis Management Act, 1862, "the expression 'new street' shall apply to and include all streets hereafter to be

C. A. 1899

ALLEN v. FULHAM VESTRY.

formed or laid out." The expression "new street" applies to an old highway as soon as it acquires the character of a street by houses being built along it: *Pound* v. *Plumstead Board of Works* (1); *St. Giles, Camberwell* v. *Crystal Palace Co.* (2) But s. 105 of the Act of 1855 has a wider application than to such a conversion from a highway into a street; it includes a road "formed or laid out" where no road previously existed. This road was "formed or laid out" in 1877, and was at that time a new street over which the district board of works and the vestry in succession to them not only might have exercised, but actually did exercise control. Having once exercised their power, they cannot subsequently call on the frontagers to contribute: *St. Giles, Camberwell* v. *Hunt* (3); *Reg.* v. *Hackney Board of Works.* (4) At all events, the apportionment cannot be supported, as it includes the expenses connected with the carriage-way which the respondents had dealt with. No doubt s. 105 of the Act of 1855 speaks of the owners of houses forming the greater part of a new street; but that section is amended by s. 77 of the Act of 1862, which throws the burden of the expense of paving a new street on owners of land abutting on it, so that the expression "new street" cannot be limited to a street in the popular sense of the term with houses abutting on it. It is submitted that *St. Mary, Battersea* v. *Palmer* (5) was wrongly decided.

Macaskie, for the respondents, was not called on.

A. L. SMITH L.J. I think our judgment should be in favour of the vestry. The vestry have apportioned and charged on certain frontagers the cost of making, paving, and sewering the Wandsworth Bridge Road, which leads from Wandsworth Bridge on the south to Fulham Road on the north. The road was originally made by the bridge company, and it ran through what were then market-gardens, and had no houses on either side of it. There was a dispute between the bridge company and the vestry as to whether the road had been sufficiently

(1) (1871) L. R. 7 Q. B. 183.
(2) [1892] 2 Q. B. 33.
(3) (1887) 56 L. J. (M.C.) 65.
(4) (1873) L. R. 8 Q. B. 528.
(5) [1897] 1 Q. B. 220.

made, and a compromise was effected whereby the company paid a sum of money to the vestry, and they made up the road, but there was no kerbing or sewering. That was in 1877, and from that time until 1890 there was no house on either side of the road. The frontagers say that the road was a new street from 1877 onwards within the meaning of the Acts of 1855 and 1862. The vestry contend that it was not a street before the first buildings were put up, or when there were houses on both sides of the road, and it then first became what is popularly known as a street—that is, a highway with houses. The magistrate has found as a fact that the road became a new street for the first time after the erection of houses thereon. It is said that his finding is wrong because there may be a street, although there is no single building on one side or the other. Looking first at s. 105 of the Metropolis Management Act, 1855, which is the charging section, I find that it commences by speaking of "the owners of houses forming the greater part of any new street," and later on of "the owners of the houses forming such street." That section certainly contemplates the existence of houses by the side of the way which is to constitute a new street. It is quite true that the interpretation clause (s. 250) says that the word "street" is to include a lane, footway, and a number of other things; but in my judgment that does not cut down the popular meaning of the word. The matter is not without authority, for in *Robinson* v. *Barton-Eccles Local Board* (1) Lord Selborne, in dealing with the interpretation clause of the Local Government Act, 1875, which, like the interpretation clause in the Act before us, includes a number of things in the word "street," says: "I look upon this portion of the interpretation clause as meaning neither more nor less than this, that the provisions contained in the Act as to streets, whether new streets or old streets, shall, unless there be something in the subject-matter and the context to the contrary, be read as applicable to these different things. It is perfectly consistent with that that they should be read as applicable, and should be applied, to those

A. L. Smith L.J.

(1) (1883) 8 App. Cas. 798, at p. 801.

C. A. 1899

ALLEN v. FULHAM VESTRY.

A. L. Smith L.J.

things to which they in their natural sense apply, and which do not require any interpretation clause to bring them in; and in the natural and popular sense of the word 'street' or the words 'new street,' I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must, or may be continuous or discontinuous); and by 'new street,' a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it." I have no doubt that is the construction to be applied to s. 105 of the Act of 1855. Then it is said that the matter has been dealt with in s. 77 of the Metropolis Management Act, 1862, as that section brings in owners of land abutting on a new street, and makes them liable to pay a proportion of the expense of paving it, for which they were not before liable. The object of that section was that whereas before the Act the owners of the houses had to pay the amount apportioned for the whole length of the street, which was unreasonable where there was also land abutting on the new street, thereafter the owners of such land were to be liable to contribute to the expense, though not necessarily in the same proportion as the owners of houses. I may refer to the judgment of my brother Wright, in *St. Mary, Battersea* v. *Palmer* (1), dealing with s. 105. He sums up the matter thus: "When s. 105 is carefully looked at, it is obvious that it not merely begins by treating houses as the essence of what is a street for the purposes of the section, but later on it goes on to use this expression: 'And the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses.' Clearly when that section was passed the Legislature was thinking of a street composed wholly or partially of houses; and I should say that the question whether there was a sufficient number of houses to make a road a street for the purposes of that Act would be a question of fact for the magistrate." With that judgment I entirely agree. I think the Divisional Court were right in their conclusion that this road was not a new street in 1877, and the magistrate has found as

(1) [1897] 1 Q. B. 220, at p. 225.

a fact that it was not a new street until houses were erected. As this way then became a new street for the first time, it was in the power of the vestry to pave it as they have done and charge the frontagers with the amount of the estimated expense. I think, therefore, that the appeal should be dismissed.

COLLINS L.J. I am of the same opinion.

ROMER L.J. I am of the same opinion, and I will only add that it appears to me to be a fallacy to suppose that because a way is within the word "street," as defined in the interpretation clause, and is newly made, that therefore it is a new street. Such a view would lead to an extraordinary result, because the definition is very wide, and among the ways that come within it we find mentioned "lane" and "footway."

Appeal dismissed.

Solicitor for appellants: *Walter M. Willcocks.*
Solicitor for respondents: *T. Blanco White.*

A. M.

1899
Jan. 23.

In re BEALL.
Ex parte THE OFFICIAL RECEIVER.

Bankruptcy—Undischarged Bankrupt—After-acquired Property—Solicitor's Bill of Costs—Chose in Action—Assignee for Value—Notice by Trustee—Priority—Out of Pocket Expenses.

An undischarged bankrupt assigned for value the amount of his taxed bill of costs as solicitor for the petitioning creditors of a company in liquidation. His trustee in bankruptcy gave notice, before the assignee, to the liquidator of the company claiming the amount of the taxed bill as part of the after-acquired property of the bankrupt.

Held, that the trustee was entitled to the amount in priority to the assignee.

Mercer v. *Vans Colina*, (1897) 67 L. J. (Q.B.) 424, followed.

In such a case the bankrupt's out of pocket expenses will, if properly vouched, be allowed to him out of the amount.

THIS application raised the question whether a mortgage by an undischarged bankrupt of a chose in action for valuable consideration was good as against his trustee in bankruptcy.

In August, 1892, a receiving order was made against E. Beall, a solicitor, carrying on business as Beall & Co.; and adjudication followed. One Goddard was appointed the trustee in the bankruptcy, but was subsequently released, and the official receiver became the trustee. Beall had not yet received his discharge.

Since his bankruptcy Beall had continued to carry on business as a solicitor, and in particular had acted as such for Messrs. Grimwade and McAllister, the liquidators of the Noltzykop Gold Mining Company, Limited.

By deed, dated March 15, 1897, Beall, as beneficial owner, assigned to Grimwade by way of mortgage all the debts or sums of money due or owing, or which might during the continuance of the security become due or owing, to him for any past or future services, costs, fees, charges, or disbursements in respect of his business of a solicitor in respect of (inter alia) the Noltzykop Gold Mining Company, Limited, as security for 350*l.* advanced to him by Grimwade.

1899

BEALL, *In re.* OFFICIAL RECEIVER, *Ex parte.*

In July, 1897, Beall, as solicitor for Grimwade and McAllister, as such liquidators as aforesaid, presented a petition to wind up a company called the West African Estates and Development Company, Limited; and on August 2, 1897, the usual compulsory order with costs was made.

On February 24, 1898, the petitioning creditors' costs in the winding-up of the last-mentioned company were taxed and allowed at 22*l.* 13*s.* 8*d.*, which sum Mr. Barnes, the liquidator of such company, was prepared to pay over to the party entitled thereto.

On April 27, 1898, Beall, in consideration of 500*l.* advanced to him by Grimwade, by deed assigned to Grimwade "all the costs, charges, and expenses due or to become due to him in the matter of the Noltzykop Gold Mining Company, Limited, in liquidation, for which he was acting as solicitor for the liquidators."

On May 7, 1898, the official receiver, as trustee in Beall's bankruptcy, gave Mr. Barnes notice claiming the 22*l.* 13*s.* 8*d.* as part of the property of the bankrupt; and in the following June Beall, on behalf of Grimwade, also gave Mr. Barnes notice claiming that sum under the mortgages of March 15, 1897, and April 27, 1898.

Thereupon the official receiver now applied to the Court for a declaration that the mortgage of March 15, 1897, was void as against him so far as regards any costs which were not due to Beall at the date thereof; and that the 22*l.* 13*s.* 8*d.* belonged to him as trustee of the property of the bankrupt.

Muir Mackenzie, for the official receiver. An undischarged bankrupt cannot, even for valuable consideration, make an assignment of his after-acquired property or future earnings as against his trustee in bankruptcy. The official receiver asks for a declaration that the mortgage of March 15, 1897, is invalid.

[WRIGHT J. Is it right to make a general declaration of invalidity now, apart from the question as to the 22*l.* 13*s.* 8*d.*?]

The title of the trustee to the future earnings of the bankrupt cannot be defeated by a mortgage like this. As to the 22*l.* 13*s.* 8*d.*, they are the property of the bankrupt. They are

1899

BEALL, *In re.* OFFICIAL RECEIVER, *Ex parte.*

costs which he is entitled to claim from the liquidator of the West African Estates and Development Company. Although the winding-up order directs the petitioners' costs to be taxed and paid, the costs are in fact paid to the solicitor: Buckley on Companies, 7th ed. p. 278; and the rule is the same in bankruptcy: *In re Coster*. (1) These costs are a chose in action, and the trustee by his notice of May 7, 1898, has obtained priority over Grimwade: *Mercer* v. *Vans Colina*. (2)

Reed, Q.C., and *N. Craig*, for Beall. It is not the practice of the Court to make a general declaration of rights: *Hampton* v. *Holman*. (3) The real question here is whether the trustee is entitled to the 22*l.* 13*s.* 8*d.* as against Grimwade, in whose favour there was also a further charge given on April 27, 1898, for valuable consideration before any notice by the trustee in bankruptcy. Costs ordered to be paid are not the property of the solicitor, but of the client, although the solicitor has a lien on them for his bill of costs: *In re General Exchange Bank* (4); and here, on the evidence, Beall had at the date of the trustee's notice been paid these costs in his current account with Grimwade, and therefore had no right to a lien on the sum in the hands of the liquidator. These costs therefore remained the property of Grimwade, and the question of notice does not arise, and the cases cited do not apply. Lastly, the assignment is within the principle of *Cohen* v. *Mitchell* (5), which was applied to a chose in action in *Hunt* v. *Fripp*. (6)

Clayton, for Grimwade.

Muir Mackenzie, in reply.

WRIGHT J. There is no doubt that one of the questions which arises in this case is a very important one, and that is whether under the circumstances the assignment of April 27, 1898, of all costs then due and payable to Mr. Beall was a good assignment as against the official receiver, his trustee in bankruptcy, irrespective of whether anything in the nature of a notice to the fund holder or a stop order had taken effect

(1) (1890) 7 Morr. 284.
(2) 67 L. J. (Q.B.) 424.
(3) (1877) 5 Ch. D. 183, at p. 187.
(4) (1867) L. R. 4 Eq. 138.
(5) (1890) 25 Q. B. D. 262.
(6) [1898] 1 Ch. 675.

before any payment over of the fund. However, the first question I have to decide here is whether the dealings between Beall and Mr. Grimwade either personally or as liquidator of the Noltzykop Company are such that I ought to consider Mr. Beall has been paid the costs in question—22*l.* 13*s.* 8*d.*—because, if the moneys actually reached his hands before the trustee in bankruptcy gave any notice or obtained any stop order, I do not think it could be contended that the trustee would be able to take the money out of Mr. Beall's hands. I think on the evidence I should not be justified in holding that the particular sum of 22*l.* 13*s.* 8*d.* had been in any sense or way paid to Mr. Beall before the notice of May 7. Then the important question arises whether that notice of May 7 so far fixed this small fund of 22*l.* 13*s.* 8*d.* as the property of the trustee as against Mr. Grimwade, that the trustee is entitled to succeed notwithstanding the assignment of April 27, 1898. But for that assignment I should have said that the trustee was certainly entitled to succeed. The previous assignment of the bankrupt was an assignment of costs to become due; and I have already held, and I do not see any reason to alter my opinion, that the bankrupt cannot make such an assignment. Then on April 27, 1898, he did make for valuable consideration, and so far as I know in good faith, this assignment of costs, which, as regards the 22*l.* 13*s.* 8*d.*, had actually become due and payable. Now, does that, on the doctrine of *Cohen* v. *Mitchell* (1), suffice without notice having been given of it? Does it suffice to undo the effect of the prior notice given by the trustee? I do not think I should gain anything by taking further time to consider the question, because I have already considered it in *Mercer* v. *Vans Colina*. (2) The authorities are not very clear, and I cannot go any further than I did there. I must do the best I can without further help. Now the language of the present Bankruptcy Act is different from the language of the Bankruptcy Act, 1869, s. 141, and, having regard to the difference in the language, I came to the conclusion in *Mercer* v. *Vans Colina* (2) that in such a case the trustee, as general assignee of the bankrupt's property, can by

(1) 25 Q. B. D. 262.

(2) 67 L. J. (Q.B.) 424.

1899

BEALL, *In re.* OFFICIAL RECEIVER, *Ex parte.*

Wright J.

giving proper notice to the holder of the fund or by a stop order, where a stop order is necessary, perfect his title as against the other assignee, and I see no reason why I should hold differently in the present case. I think, therefore, that the trustee in bankruptcy here is entitled to succeed on that part of the case. Whether it is worth while to take proceedings of this kind for such small sums or under such circumstances I do not stop to inquire. I do not know enough of the affairs of the particular bankruptcy or the particular assignee here to entitle me to express any definite opinion upon that; but I should have thought, unless under special circumstances, it would not be desirable to press for a small sum like this where the money no doubt as been dealt with in a way which in itself is not unjust between the parties. Then there is another and a larger claim by the trustee, and that is that I should declare generally that the previous mortgage or assignment of March 15, 1897, is void as to all costs which had not become due before the date of it. I do not think I ought to make a general declaration of that kind. It seems to me that there may be circumstances in each case which would be very necessary to be considered before one should decide absolutely one way or the other. It is not in this instance necessary to make any such declaration, because it is not suggested that at present there is any other sum in question; but, however that may be, I do not see my way to make a general declaration on the subject.

Reed, Q.C. I ask for an allowance to be made to Mr. Beall out of this 22*l.* 13*s.* 8*d.* Upwards of 15*l.* of it are costs actually paid out of pocket by him.

Muir Mackenzie. I agree that out of pocket expenses should be allowed, subject to vouchers being produced.

Solicitor for trustee: *Murton.*

Solicitors for respondents: *E. Beall & Co.; C. H Hoare.*

H. L. F.

CREE AND ANOTHER *v.* THE VESTRY OF SAINT PANCRAS.

1899
Feb. 28;
March 6.

Public Authorities Protection—Act done in Pursuance of Act of Parliament—Limitation of Action—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, "Where . . . . any action . . . . is commenced . . . . against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, ... the action . . . . shall not lie, ... unless it is commenced within six months next after the act . . . . complained of."

A sanitary authority served notices, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, on the owner of premises, requiring him to do certain specified works in respect of what was supposed to be a drain. He complied with the notices, and incurred expense in doing the works. It was discovered that the supposed drain was a sewer, which the sanitary authority was liable to repair, and the executors of the owner brought an action against the sanitary authority, to recover the amount of the expenses incurred, as money paid to the use, and at the request, of the defendants. The action was not commenced within six months after the expenses had been paid:—

Held, that the action was brought for an act done in pursuance, or execution, or intended execution, of the Public Health (London) Act, 1891, within the meaning of the Public Authorities Protection Act, 1893, s. 1, and ought to have been brought within six months, and therefore the defendants were not liable.

Waterhouse v. *Keen*, (1825) 4 B. & C. 200, and *Midland Ry. Co.* v. *Withington Local Board*, (1883) 11 Q. B. D. 788, followed.

ACTION tried before Bruce J. without a jury.

The plaintiffs, as executors of Thomas Cree, deceased, sued to recover a sum of 70*l.*, as money paid by Thomas Cree to the use, and at the request, of the defendants. The defendants, who were the sanitary authority for the parish of St. Pancras, had served notices on Thomas Cree, as owner of premises in the parish, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, requiring him to do certain works in order to abate an alleged nuisance arising from what was supposed to be a drain; the notices specified the works required to be done. Thomas Cree executed the specified works at an expense of 70*l.* In the course of the execution of the works it was discovered

1899

CREE v. ST. PANCRAS VESTRY.

that the supposed drain was a sewer, and that the defendants, as the sanitary authority, were liable to do the repairs which Thomas Cree had been called upon to do. (1) The plaintiffs now sued to recover the amount which Thomas Cree had expended in executing the works in compliance with the notices. The action was not commenced within six months after the expenditure of the money. The defendants pleaded (together with other defences, which they failed to establish) that the plaintiffs' claim was barred by the Public Authorities Protection Act, 1893, s. 1. (2)

Feb. 28. *Macmorran, Q.C.*, and *Symmons* (*Hextall* with them), for the plaintiffs.

Corrie Grant, for the defendants.

Cur. adv. vult.

March 6. The following written judgment was delivered by

BRUCE J. This case raises a very nice question, and, after giving the matter careful consideration, I have reluctantly come to the conclusion that I ought to give judgment for the defendants.

The defendants, on September 14, 1893, caused notices to be served on the plaintiffs' testator, and by such notices requested work to be done to abate an alleged nuisance, and specified the work required to be done, in connection with a supposed drain. These notices were given, I understand, pursuant to s. 4 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). A

(1) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 68, 69.

(2) 56 & 57 Vict. c. 61, s. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding, is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding, shall not lie, or be instituted, unless it is commenced within six months next after the act, neglect, or default, complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

person making default in complying with such notice is liable to a fine. It is further provided by s. 5 that, if a person on whom notice to abate a nuisance has been served makes default, the sanitary authority shall make a complaint, and a petty sessional court may make a nuisance order, one form of which may be an order to comply with the requisitions of the notice. Sect. 11 contains provisions as to costs. Among other things it provides that, if no order is made, but the nuisance is proved to have existed when the notice was served, the costs shall be deemed to be money paid to the use, and at the request, of the person by whose act, default, or sufferance, the nuisance was caused. These costs include the costs and expenses of carrying into effect the notice to abate the nuisance: *Gebhardt* v. *Saunders*. (1) The plaintiffs' testator complied with the notices, and executed the specified works at an expense of 70*l*. In the course of the execution of the works it was discovered that the supposed drain was a sewer, and that the defendants were liable to do the repairs which the plaintiffs' testator had been called upon to do.

In these circumstances the plaintiffs in this action seek to recover from the defendants the sum of 70*l*., as money paid by the plaintiffs' testator to the use, and at the request, of the defendants. And, apart from the point raised on the construction of the Public Authorities Protection Act, 1893, there can be no doubt that the plaintiffs are entitled to recover: *Andrew* v. *St. Olave's Board of Works*. (2)

But the whole point in the case turns upon the meaning of s. 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). That section enacts that, "Where after the commencement of this Act any action is commenced against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, the action shall not lie unless it is commenced within six months after the act, neglect, or default complained of."

(1) [1892] 2 Q. B. 452. (2) [1898] 1 Q. B. 775.

1899

CREE v. ST. PANCRAS VESTRY.

Bruce J.

Is this action an action for any act done in pursuance, or intended pursuance, of an Act of Parliament, or of any public duty?

The action is an action for money paid to the use, and at the request, of the defendants. The defendants requested the plaintiffs' testator to do the work; without that request this action would not be maintainable. The request to do the work seems to me to be the basis of this action. It is quite true that the request alone would not entitle the plaintiffs to maintain the action; unless their testator had expended the money pursuant to the request, the action could not have been maintained. *Waterhouse* v. *Keen* (1) seems to me to resemble the present case. There there was, as in this case, an unlawful demand, and, as in this case, a payment in pursuance of the unlawful demand. The action was brought to recover back a toll, which had been unlawfully demanded, and paid. It was an action on the money counts, and it was held that, because the defendant, who demanded the toll, acted colore officii, the action was brought for a thing done pursuant to a Turnpike Act, which authorized the taking of certain tolls. No doubt in that case the defendant might have enforced his demand for the tolls by stopping the plaintiff's coach at the turnpike gate, but so, in the present case, if the request of the defendants had not been complied with, they had ample means of enforcing the request. In that case, as in the present, the payment of the money was an essential ingredient in the cause of action, yet the cause of action was regarded as depending upon the request for payment. In *Midland Ry. Co.* v. *Withington Local Board* (2) notice was given to the plaintiffs by the local board, the defendants, to do certain paving work; the plaintiffs not having done the work, the defendants did it, and charged the cost to the plaintiffs, who paid it. It was afterwards discovered that the plaintiffs were not liable, and in the action they demanded back the money they had paid, as money paid under a mistake of fact. It was held that the action was for taking and keeping money, and that that was an act done, within the

(1) 4 B. & C. 200.

(2) 11 Q. B. D. 788.

meaning of the Public Health Act, 1875. (1) Lindley L.J. there said: "The question is, did the defendants keep the money, intending to act under the provisions of the Public Health Act, 1875? The answer must be clearly in the affirmative." (2)

In the present case the defendants did not take and keep the money, but they required the expenditure of the money, and they required that expenditure, intending to act under the provisions of the Public Health (London) Act, 1891. Can it make any difference that the money, which was expended at the request of the defendants, was not paid into their hands, but was paid by the plaintiffs' testator in executing works, which the defendants, acting in their official capacity, required to be done? I do not think it can. This is I think in substance an action brought to recover money, which the defendants improperly required the plaintiffs' testator to expend, and which he did expend, and because the defendants, in making that improper requirement, acted, as they thought, under colour of their statutory powers, they are entitled to the protection which the Public Authorities Protection Act confers.

I have not overlooked s. 11 of the Public Health (London) Act, 1891, according to which the money expended in abating the nuisance is to be deemed to be money paid for the use, and at the request, of the defendants, because, according to the facts, as they are now known to exist, it was by their act or default that the nuisance was caused. But even in this view of the case the defendants are protected, because if the action depends upon their act or default, it was an act or default done under colour of performing a public duty, and in that case the action must be brought within six months next after the act or default.

As the defence is of a purely technical character, I should, if I had a discretion in the matter, give judgment for the defendants without costs. But the Public Authorities Protection Act, 1893, s. 1 (*b*), takes away my discretion respecting costs, and I

(1) 38 & 39 Vict. c. 55, s. 264. This section is repealed by the Public Authorities Protection Act, 1893, s. 2.

(2) 11 Q. B. D. at p. 796.

1899

CREE v. ST. PANCRAS VESTRY.

Bruce J.

am compelled to give the defendants the costs of the action, to be taxed as between solicitor and client. But as the defendants have succeeded on one issue only, they are not entitled to such costs as may be apportionable to the other issues. I therefore direct that such costs as are properly apportionable to the issues raised on the 1st, 2nd, 3rd, 4th, 5th, and 6th paragraphs of the statement of defence shall be the plaintiffs' costs.

I have only to say in conclusion that the case seems a strong commentary on the rules laid down by modern statute law. The defendants, a sanitary authority, have, by their own default, created a nuisance in their own district; by an unlawful exercise of their authority they induced a person, who was not liable, to expend 70*l.* in doing what the defendants themselves ought to have done; when the plaintiffs seek to recover from the defendants the 70*l.* so expended, the defendants raise, and succeed upon, the technical defence of a six months' statute of limitation, and this defence is considered by the Legislature so meritorious that the defendants are by statute declared to be entitled to costs as between solicitor and client, although it is open to grave doubt whether, apart from this special enactment, conferring this privilege upon a defendant who succeeds on a technical defence, the judge, even in a meritorious case, at common law, would have any jurisdiction to order costs to be taxed as between solicitor and client: *Andrews* v. *Barnes.* (1)

Judgment for the defendants.

Solicitors for plaintiffs: *Cree & Son.*
Solicitors for defendants: *Cunliffes & Davenport.*

(1) (1888) 39 Ch. D. 133.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 17.

HASLUCK *v.* CLARK.

Bankruptcy—Administration of Estate of Deceased Debtor—Execution not completed by Sale—Rights of Execution Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.

An order for the administration of the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of s. 45 of that Act, so as to disentitle an execution creditor of the deceased debtor to retain, as against the trustee of the debtor's estate, the benefit of an execution not completed before the date of the administration order.

Judgment of Wright J., [1898] 2 Q. B. 28, affirmed.

Appeal from a judgment of Wright J., reported [1898] 2 Q. B. 28.

On September 29, 1897, judgment was recovered by one Isabella Clark in an action against Joseph Metz for 4488*l*. On October 18 Metz died. On October 22 the goods of the deceased judgment debtor were seized under a writ of fi. fa., but were not sold. On October 26 leave was given by a master to continue the execution against Metz, deceased. On November 3 letters of administration were granted to the debtor's widow. Subsequently the creditors of the deceased resolved to petition for an order for the administration of the estate of the deceased under s. 125 of the Bankruptcy Act, 1883. A firm, who were the largest creditors, presented a petition in accordance with that resolution, and on November 19 an administration order was made with the concurrence of the deceased's widow. Notice of that order having been given to the sheriff, he informed the execution creditor of that fact. The execution creditor threatened to hold the sheriff liable in damages if he acted upon the notice; whereupon the sheriff interpleaded, and an issue was directed, in which Hasluck, who had been appointed trustee, was plaintiff and the execution creditor defendant, to try whether at the time of the seizure the goods seized were the property of the plaintiff as trustee of the estate

C. A. 1899

HASLUCK v. CLARE.

of the deceased as against the execution creditor. The action was tried before Wright J. without a jury, and judgment was given for the defendant. (1)

The plaintiff appealed.

1899. Jan. 25. *Herbert Reed, Q.C.*, and *Muir Mackenzie*, for the plaintiff. Under s. 45 of the Bankruptcy Act, 1883, execution is not effective against the trustee in bankruptcy of the execution debtor unless, in the case of goods, it has been completed by seizure and sale. (2) By s. 125, sub-s. 6, the provisions of Part III. of the Act (which includes s. 45) are to apply "so far as the same are applicable" to the case of an administration order. (3)

In *In re Gould* (4) Cave J. expressed an opinion that s. 45 was inapplicable to an administration order; but in *Watkins* v. *Barnard* (5) Vaughan Williams J. declined to decide the case on the broad ground that s. 45 cannot apply in such a case. It is submitted that the view of Cave J. was wrong, for the goods seized remained the property of the debtor, though in the custody of the law, and when the order was made they were held for the trustee. Under s. 11 of the Bankruptcy Act, 1890, where goods have been seized but not sold, and a receiving order has been made, it is the duty of the sheriff,

(1) [1898] 2 Q. B. 28.

(2) 46 & 47 Vict. c. 52, s. 45: "(1.) Where a creditor has issued execution against the goods . . . . of a debtor . . . . he shall not be entitled to retain the benefit of the execution . . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . . before the date of the receiving order . . . ."

"(2.) For the purposes of this Act an execution against goods is completed by seizure and sale . . . ."

(3) 46 & 47 Vict. c. 52, s. 125: "(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy."

"(6.) With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act."

(4) (1887) 19 Q. B. D. 92.

(5) [1897] 2 Q. B. 521.

on notice of the order, to deliver the goods to the official receiver, and that provision is applicable to such a case as the present one.

A. T. Lawrence, Q.C., and *T. Willes Chitty*, for the defendant. Sect. 125 only deals with the estate of a deceased debtor, that is, such estate as he could have dealt with. These goods were no part of Metz's estate. At common law the goods of a judgment debtor were bound by the writ of execution from the time of its date: *Lucas* v. *Nockells*. (1) Now, by the Sale of Goods Act, 1893, s. 26, "a writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed." Then the Bankruptcy Acts enact that to oust the rights of other creditors in bankruptcy the execution must have been completed by sale. This applies only to the case of a bankruptcy order, and not to an administration order under s. 125. The Bankruptcy Act, 1890, was subsequent to the decision in *In re Gould* (2), and must be taken to confirm it.

Herbert Reed, Q.C., in reply.

Cur. adv. vult.

March 17. A. L. SMITH L.J. read the following judgment:—This is an interpleader issue, and the material facts are these.

Upon September 29, 1897, the defendant in the issue (Mrs. Clark) obtained judgment against a person named Metz for 4488*l*. Upon October 18 Metz died, and on October 22 the sheriff levied upon and seized the goods of Metz under a fi. fa. upon Mrs. Clark's judgment. Upon November 19, whilst the goods so seized were still held by the sheriff, an order for the administration of the estate of the deceased debtor (Metz) was obtained under s. 125 of the Bankruptcy Act, 1883, at the instance of a creditor of Metz, under which order the plaintiff Hasluck has become trustee. The question is, Do the goods seized and held by the sheriff vest, under the administration order of November 19, 1897, in the trustee Hasluck freed and

(1) (1833) 10 Bing. 157, at p. 182. (2) 19 Q. B. D. 92.

C. A. 1899

HASLUCK v. CLARK.

A. L. Smith L.J.

discharged from the execution, so that the execution creditor is thus deprived of her right to the proceeds of the goods so seized and held by the sheriff in execution upon her judgment? Apart from the bankruptcy of an execution debtor intervening between seizure and sale of goods by a sheriff, and apart from the question raised in this case, the answer would clearly be, No.

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26, which re-enacts a provision in the Statute of Frauds, it is enacted that a writ of fi. fa. shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed. By s. 125, sub-ss. 1 and 2, of the Bankruptcy Act, 1883, the true construction of which has now to be decided, it is enacted that a petition, in certain events which exist here, may be presented praying for an order for the administration of the estate of a deceased debtor according to the law of bankruptcy, and that an order for the administration in bankruptcy of the deceased debtor's estate may be thus obtained. Now, upon such an order being obtained, what is to happen as to the property of the deceased debtor? Sub-s. 5 deals with this, and enacts that upon an order being made for the administration of a deceased debtor's estate the property of the debtor shall vest in the official receiver, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of the Act. What does this mean? Does it mean that the property of the deceased debtor bound as it is by the execution levied thereon shall vest in the official receiver, or that the property of the debtor unbound by the execution is to vest in him? In this sub-s. 5 of s. 125, which is the vesting section, I cannot find words which shew that the property of the debtor unbound by the execution is to vest in the official receiver. It is the property of the debtor, which may be either bound or unbound by an execution when the order for an administration is obtained, which is to vest and which is to be administered under the administration order. If it is bound it vests subject to the fetter; if it is unbound it passes as it is. Then comes sub-s. 6 of s. 125. It enacts that, "with the modifications hereinafter

mentioned" (these will be found in sub-s. 7 and post, and do not affect this case), "all the provisions of Part III. of this Act relating to the administration of the property of a bankrupt shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." This, I think, means, as Fry L.J. has pointed out in *In re Gould* (1), that the section applies to the mode of administration and not to the subject-matter to be administered.

I have already dealt with what is the property of the deceased debtor which vests in the official receiver or, as in this case, in the trustee, and which is to be administered. Part III. embraces ss. 37 to 65 inclusive, amongst which is s. 45. This section enacts that "where a creditor has issued execution against the goods . . . . of a debtor . . . . he"—that is, the creditor—"shall not be entitled to retain the benefit of the execution . . . . against the trustee in bankruptcy of the debtor unless he has completed the execution . . . ." that is by seizure and sale "before the date of the receiving order and before notice of the presentation of any bankruptcy petition . . . . against the debtor or of the commission of any available act of bankruptcy by the debtor."

It is argued that an order for the administration of the estate of a deceased debtor under s. 125, if not a receiving order, a bankruptcy petition, or an act of bankruptcy within the meaning of those terms, is equivalent thereto. If the Legislature had intended that this should be so, I should certainly have expected to have found it enacted that an administration order was to have the same effect as, or be equivalent to, a receiving order, a bankruptcy petition, or an act of bankruptcy; but no such words are to be found. I do find, however, in the Act what effect an administration order is to have, for by sub-s. 9 of s. 125 it is expressly enacted that notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition for an order for administration, in the event of such order being obtained, shall be deemed to be equivalent to notice of an act of bankruptcy, so that after

(1) 19 Q. B. D. 92, at p. 100.

C. A. 1899

HASLUCK v. CLARK.

A. L. Smith L.J.

such notice no payment or transfer of property shall operate as a discharge to such personal representative. Nowhere in the Act is it enacted that notice of a petition for administration shall be equivalent to notice of an act of bankruptcy to an outside execution creditor, so as to take away the right he possessed to have the goods in the hands of the sheriff sold and applied to the payment of the judgment debt. I would also point out that in sub-s. 13 of s. 18 of the Act of 1883, where the Legislature, as regards Part III., intended that particular words should have particular meanings, it specifically enacts that they shall have such meanings. No reference is made therein to the case in hand.

If the contention of the trustee be correct, a different asset would have to be administered when an administration of an insolvent debtor's estate takes place in the Chancery Division and when an administration of such an estate takes place in the Court of Bankruptcy, for in the one the estate bound by the execution would be what was to be administered, and in the other the estate freed from the execution would be the available asset. It is not disputed that if the estate of the deceased insolvent debtor were being administered in the Chancery Division the estate bound by the execution would be what was to be administered, and it has been held by the Court, in the case of *In re Withernsea Brickworks* (1), that under s. 10 of the Judicature Act, 1875, which imported some of the bankruptcy rules in the winding-up of companies, the rule as to execution being avoided where the goods had been seized but not sold was not imported into the winding-up proceedings.

As before stated, if the appellant's contention be correct the estate which would have to be administered would depend upon which tribunal happened to have the administration, and I cannot think that this is correct.

Moreover, it has been held by Cave J. in the case of *In re Gould* (2) that s. 47 of Part III. of the Act of 1883, which deals with the avoidance of voluntary settlements, was not applicable to s. 125, and he gives fully his reasons for so holding. I do not repeat them, for they will be found in the

(1) (1880) 16 Ch. D. 337. (2) 19 Q. B. D. 92.

report of his judgment. He also said, though this was obiter, that s. 45 did not apply.

Upon appeal, at page 98 of the same report, his decision as to s. 47 was upheld in this Court, and Lord Esher stated that he agreed with every reason given by Cave J.

The groundwork of the decision of the Court of Appeal, which will be seen especially from Fry L.J.'s judgment, was that s. 125 dealt with the mode of administration and not with the subject-matter to be administered, and that it dealt with the deceased debtor's estate and nothing else.

Although in *In re Gould* (1) it was the property of third persons, namely, the trustees of the settlement, which was attempted to be dealt with under s. 125, yet the reasoning to be found in that judgment appears to me to apply to this case, namely, that rights of third parties are not to be affected unless the intention is expressed in plain terms; and surely this cannot be found in s. 125.

Mr. Chitty for the execution creditor pointed out that, with the judgments in *In re Withernsea Brickworks* (2) and those of Cave J. and the Court of Appeal in 1887 in *In re Gould* (1) standing unimpeached, the Legislature in the year 1890 passed sub-ss. 1 and 2 of s. 11 of the Bankruptcy Act, 1890, wherein it expressly dealt with the duties of sheriffs as regards goods taken in execution both before and after sale, and that there is in these sections no indication that the Legislature desired to alter what had been said and held in the prior cases, for it again dealt with the effect of receiving orders and petitions in bankruptcy and with them alone, and not with the effect of orders of administration under s. 125.

In my judgment, if an order for administration under s. 125 is to be the equivalent of a receiving order or a petition in bankruptcy or an act of bankruptcy, it is for the Legislature and not for a court of law to say so.

I am aware that there are dicta of the then Mr. Justice Vaughan Williams in *Watkins* v. *Barnard* (3) which indicate his dissent from what Cave J. has said and held, affirmed as it was

(1) 19 Q. B. D. 92. (2) 16 Ch. D. 337.
(3) [1897] 2 Q. B. 521.

C. A. 1899

HASLUCK v. CLARK.

A. L. Smith L.J.

in this court in the case of *In re Gould* (1), and he pointed out what he should do when occasion arose, though he decided that in the circumstances of the case before him neither s. 45 of the Act of 1880 nor s. 11 of the Act of 1890 were applicable to s. 125 of the Act of 1883. For the reasons above I think the judgment of Wright J. should be affirmed and this appeal dismissed with costs.

A. L. SMITH L.J. I will now, by consent of counsel, read the judgment of the late Lord Justice Chitty.

CHITTY L.J. I am of the same opinion. The question is whether the order for the administration of the deceased debtor's estate under the 125th section of the Bankruptcy Act, 1883, has taken away the right which, apart from that section, the execution creditor possessed to have the goods in the hands of the sheriff sold and applied in payment of the judgment debt. It is not a question whether the property in the goods passed to the trustee under the administration order, but a question whether they passed free from the right of the execution creditor.

The state of the law prior to the passing of the Act of 1883 was this. Before the Judicature Act, 1875, the personal estate of a deceased debtor which fell to be administered under an administration decree was the estate which vested in the legal personal representative of the deceased. All subsisting liens, charges, and rights, whether legal or equitable, remained undisturbed. Then came the Judicature Act, 1875, which by the 10th section imported certain bankruptcy rules into the administration of the estates of deceased insolvent debtors and the winding-up of insolvent companies. The section was ill-framed, and there was much difference of judicial opinion as to its true effect. Ultimately it was decided that the section did not enlarge the estate of the deceased insolvent debtor or of the insolvent company in the winding-up. It will suffice to refer to two authorities, both decided before 1883. In *In re Withernsea Brickworks* (2) (decided in 1880) the

(1) 19 Q. B. D. 92. (2) 16 Ch. D. 337.

question was whether the then existing bankruptcy rule avoiding an execution, where the goods had been seized but not sold, was imported into the winding-up of an insolvent company, and it was held by the Court of Appeal that it was not. In *In re D'Epineuil* (1) (decided in 1882) the question was whether the rule avoiding an unregistered bill of sale in bankruptcy was imported into the administration of the estate of a deceased insolvent debtor, and it was held that it was not. Such, then, was the known state of the law when the 125th section of the Act of 1883 was passed.

The question turns on the true construction of the 125th section. The appellant relies on the 6th sub-section. It is very loosely worded. Instead of pointing out, as might have readily been done, what provisions of Part III. are to be applied, it leaves it to the Court to discover which of the provisions are applicable. The precise question is whether s. 45, which occurs in Part III., is applicable. Now, apart from the 6th sub-section, I think it is clear that the subject-matter dealt with by the 125th section is the estate of the deceased debtor in the sense in which that term is invariably used, namely, the property to which he was entitled at the time of his death so far as it has not been lawfully dealt with since his death, before the order for administration is made, and subject to all liens, charges, and rights subsisting in other persons. The 1st, 2nd, 4th, 5th, and 8th sub-sections all speak of the deceased debtor's estate as that which is to be administered under the order for administration. The term "property of the debtor" also occurs in the 5th, 6th, and 7th sub-sections; but, in my opinion, that term is obviously employed in the same sense as estate. The provision for vesting is contained in the 5th sub-section. It enacts that, upon an order being made for the administration of a deceased debtor's estate, the property of the deceased debtor shall vest in the official receiver of the Court as trustee thereof. The effect of this enactment on the personal estate of the debtor is to divest out of the legal personal representative the personalty vested in him at the time of the order and to vest the same in the official receiver. In support of this view I refer to the

(1) 20 Ch. D. 217.

C. A. 1899

HASLUCK v. CLARK.

Chitty L.J.

3rd sub-section, which prohibits the making of an administration order until the expiration of two months from the grant of probate or letters of administration except with the concurrence of the legal personal representative, or unless the debtor committed an act of bankruptcy within three months prior to his decease. This sub-section has been in part repealed by s. 21, sub-s. 1, of the Bankruptcy Act, 1890, which in effect strikes out the period of two months. But the enactment as it stood, by postponing the jurisdiction to make the administration order for two months after probate or letters of administration, a period which might not expire until many months or even years after the debtor's decease, affords a strong reason against the incorporation of the 45th section. In ordinary course an execution would be completed long before the expiration of two months. Reverting to the vesting sub-section, I think that the ordinary rules of construction would not justify us in holding that it passed the goods seized freed from the rights of the execution creditor. What the trustee is by that sub-section directed to realize and distribute is the property of the deceased debtor, and nothing more. Then I come to the 6th sub-section itself. I think that the words "relating to the administration of the property of a bankrupt" mean what they say—that is, the property of the bankrupt, and not the property of third persons which is by express provisions swept into the fund distributable under a bankruptcy for the benefit of the creditors. Further, I think that the objections to holding that the provisions of the 45th section are applicable to an administration order under s. 125 are insuperable. To hold that they are is to import into the 125th section words which are not there. I look in vain for any words which shew that the administration order or any of the proceedings thereunder are, or are to be deemed to be, an equivalent for a receiving order, or for a bankruptcy petition, or an act of bankruptcy of the deceased. I concur entirely in the observations which A. L. Smith L.J. has made on these points.

On the construction of the 125th section I think that the provisions of the 45th section are not imported into the 125th section, and that they are not applicable. To take away a

right such as that of the execution creditor, plain words manifesting the intention of the Legislature are required, and I am unable to find them.

The contrast between the language of the 125th section and of the 18th section, sub-s. 13, the authority of *In re Gould* (1), the dicta in *Watkins* v. *Barnard* (2), and the bearing of the 11th section, sub-ss. 1 and 2, of the Bankruptcy Act, 1890, have already been dealt with so fully that I cannot usefully add anything on those points; save this. By the 21st section of the Act of 1890 the Legislature dealt expressly with the 125th section, and made certain amendments therein, but left *In re Gould* (1) and the principle of that authority untouched. It also enacted by s. 3, sub-ss. 16 and 17 (I state the enactment shortly) that if under a composition a trustee is appointed, s. 27 and Part V. of the principal Act should apply as if the trustee were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication" included respectively a composition, a compounding debtor, and an order approving the composition, and that Part III. of the Act of 1883 should, so far as the nature of the case and the terms of the composition admit, apply thereto, the same interpretation being given to the words "trustee," "bankrupt," and "order of adjudication," as above stated: yet no corresponding amendment was made in the 125th section.

It is plain that if the order for administration had been made in the Chancery Division the rights of the execution creditor would have remained unaffected. It would be a strange result if her rights depended on the court in which the administration takes place. The 4th sub-section of s. 125 barred the right to present a petition under that section where proceedings in any court of justice for the administration of the deceased debtor's estate had already been commenced, but conferred on that Court a discretionary jurisdiction to order a transfer of the proceedings to bankruptcy where the estate is insolvent. No jurisdiction was given to the Court exercising jurisdiction in bankruptcy to order the transfer. This seems to shew that the

(1) 19 Q. B. D. 92. (2) [1897] 2 Q. B. 521.

C. A. 1899

HASLUCK v. CLARK.

Chitty L.J.

Legislature considered it immaterial in which court the administration took place, and that the rights of persons interested would be dealt with on the same footing whichever tribunal controlled the administration. These observations are adverse to the appellant.

For these reasons, I agree that the appeal ought to be dismissed.

A. L. SMITH L.J. I may state that the Lord Chancellor agrees with these judgments, and that the judgment of the Court will be dated as of the date when the argument concluded.

Appeal dismissed.

Solicitors for plaintiff: *Goldbergs & Langdon.*
Solicitors for defendant: *Thomas White & Son.*

A. M.

C. A. 1899 *March* 22.

[IN THE COURT OF APPEAL.]

POWELL *v.* MARSHALL, PARKES & CO.

Bankruptcy—Contract for Sale of Lease—Deposit—Act of Bankruptcy by Vendor before Completion—Action to Recover Deposit—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

Distinguished. JENNINGS' TRUSTEE v. KING [1952] 1 Ch. 899

On a contract for the sale of the lease of a public-house a day was fixed for completion, and the plaintiff, the purchaser, paid a deposit to the defendants as stakeholders. It was a term of the contract that the deposit should be forfeited in case the purchaser refused to perform his part of the agreement. Before the date fixed for completion the vendor committed an act of bankruptcy, which came to the notice of the purchaser, who thereupon refused to complete, and demanded the return of the deposit:—

Held, that though the contract for sale was protected by s. 49 of the Bankruptcy Act, 1883, the assignment and the payment of the purchase-money, in pursuance of the contract but after notice of the act of bankruptcy, would not have been protected, and that the purchaser was therefore not bound to complete, and was entitled to recover the deposit.

APPEAL from a judgment of Wills J. at the trial of the action with a jury.

The action was brought to recover a sum of 500*l.* paid to the defendants as stakeholders under the following circumstances.

On November 17, 1897, the defendants, as agents of one Inman, contracted with the plaintiff to sell to him the lease of a public-house, and the plaintiff paid to them a deposit of 500*l*. By the contract December 15, 1897, was fixed as the date for completion, and it was provided that the deposit should be forfeited if the plaintiff should neglect or refuse to perform his part of the agreement, but that it should be returned in case such neglect or refusal should arise on the part of the vendor. Upon November 24 a bankruptcy notice was served on Inman, who did not comply with the requirements thereof within seven days, and thereby committed an available act of bankruptcy on December 2. Upon December 9 the plaintiff, having heard of this act of bankruptcy, gave notice that he refused to complete, and demanded the return of the deposit, and, on non-payment, brought this action to recover it. The learned judge directed a verdict for the plaintiff, and entered judgment accordingly.

The defendants appealed.

R. Wallace, Q.C., and *J. W. S. Kay*, for the defendants. The contract for the sale was a contract for valuable consideration entered into by the plaintiff without notice of an available act of bankruptcy on the part of the vendor. It was therefore protected by s. 49 of the Bankruptcy Act, 1883. As the contract was valid, the incidents, such as payment of the purchase-money and execution of the conveyance, would also be protected and valid: *Ex parte Holthausen, In re Scheibler*. (1) There was nothing to prevent the transaction being carried out, and that it was not completed was through the default of the plaintiff, and in consequence, by the terms of the contract, he cannot recover the deposit.

[They cited also *Ex parte Rabbidge, In re Pooley*. (2)]

W. Ellis Hill, for the plaintiff. Though the contract of November 15 might have been protected by s. 49, there is no provision in that section that subsequent transactions founded on such a contract are protected. *Ex parte Rabbidge, In re Pooley* (2), is in point, for it was assumed in that case that

(1) (1874) L. R. 9 Ch. 722. (2) (1878) 8 Ch. D. 367.

C. A. 1899

POWELL v. MARSHALL, PARKES & Co.

the contract to sell was protected, but it was held that the purchaser had no right to pay the purchase-money to the vendor after notice of an act of bankruptcy. If the transaction had been carried out, and a receiving order had been made within three months of December 2, the trustee would have been entitled to the property, and the plaintiff could only have obtained it by paying twice over. [He cited *In re Pollitt, Ex parte Minor.* (1)]

R. Wallace, Q.C., in reply.

A. L. SMITH L.J. This is an action to recover from stakeholders a deposit paid by the plaintiff on a contract for the sale of a lease. By the terms of the contract the purchase was to be completed on a certain day, and if the plaintiff, as vendee, neglected or refused to complete, the deposit was to be forfeited. It is admitted that time was of the essence of the contract. Before the day fixed for completion a bankruptcy notice was served on the vendor, and as he did not comply with it an act of bankruptcy was committed by him. The plaintiff heard of this, and he gave notice that he should not go on with the transaction, and demanded back the deposit. The question whether he can recover it turns on this: Was the vendor in a position to complete on the day fixed for completion? I agree with the learned judge who tried the case that the vendor was not in a position to complete. If the vendor had conveyed the property, and afterwards had been adjudicated bankrupt on the act of bankruptcy which he had committed, his trustee could have intervened on the ground that his title related back to the date of the act of bankruptcy. If the purchase-money had been paid to the vendor, the trustee could have claimed it again from the plaintiff, on the ground that the payment to the vendor was made after notice of an act of bankruptcy by him. Under these circumstances, it seems to me to be clear that the vendor was not in a position to complete on the day fixed for completion.

It is argued that the transaction, if it had been carried through, would have been protected by s. 49 of the Bank-

(1) [1893] 1 Q. B. 455.

ruptcy Act, 1883; but the protection given by that section is expressly limited by the second proviso to cases where the person making, executing, or entering into a payment, delivery, conveyance, assignment, contract, dealing, or transaction, had not, at the time when he did so, notice of an available act of bankruptcy committed by the bankrupt before that time. As the plaintiff had, before the date fixed for completion, notice of an act of bankruptcy committed by the vendor, the payment over of the purchase-money would not have been protected under s. 49. The non-completion, therefore, arose from no default of the plaintiff, and he is entitled to recover the deposit. The appeal will be dismissed.

COLLINS L.J. I am of the same opinion. The argument based on the case of *Ex parte Holthausen, In re Scheibler* (1), perplexed me for some time. It was that the purchaser, having obtained an indefeasible right to a transfer either from the bankrupt or the trustee in bankruptcy, is in no worse position after the act of bankruptcy than before, because there has been no total failure of consideration. Some of the remarks of James L.J. seem at first sight to support that view; but, on looking more closely at the case, it does not conflict with *Ex parte Rabbidge, In re Pooley* (2), because in the first-mentioned case the purchasers had made all the payments that were required of them, and all that remained to be done to complete the contract was that they should get a conveyance. In this case, if the plaintiff had paid the money to the vendor and he had subsequently become bankrupt, as the trustee's title would relate back to a date before that payment, it would have been, to quote James L.J. in *Ex parte Rabbidge, In re Pooley* (2), "the purchaser's misfortune that he has paid the money to a person who had then ceased to be owner of the property." If the plaintiff had insisted on having a valid conveyance from the trustee he could only have done so at the risk of having to pay the purchase-money twice over. Under these circumstances the plaintiff was not bound to complete, and is entitled to recover the deposit.

(1) L. R. 9 Ch. 722. (2) 8 Ch. D. 367.

C. A. 1899

POWELL v. MARSHALL, PARKES & Co.

ROMER L.J. I agree. The argument addressed to us as to the protection afforded by s. 49 was ingenious; but I may point out that s. 49, while it protects a contract made without notice of an act of bankruptcy, does not purport to protect any conveyance or assignment made in pursuance of such a protected contract.

Appeal dismissed.

Solicitors for plaintiff: *Gush, Phillips, Walters & Williams.*
Solicitors for defendants: *Barton & Brown.*

A. M.

C. A. 1899 *March* 14.

[IN THE COURT OF APPEAL.]

ELLIS AND ANOTHER *v.* WADESON AND ANOTHER.

Practice—Action against Partners in Firm Name—Death of Partner after Appearance—Defence of Surviving Partner—Form of Defence.

An action was brought against a firm in the firm name. There were two partners, one of whom died after writ and appearance. The surviving partner put in a defence not purporting to be the defence of the firm, but as his personal defence to the action:—

Held, that the form of the defence was wrong, as the defendant, not being sued in his personal capacity, was not entitled to put in a personal defence, but only a statement of defence for and in the name of the firm.

APPEAL from an order of a judge at chambers, giving the plaintiffs leave to sign judgment for default of pleading.

The action was brought against a partnership by the firm name of Wadeson & Malleson. The partners at the time of action brought were Malleson & Nesbitt. After the issue of the writ, appearance thereto, and statement of claim, Malleson died. The surviving partner, Nesbitt, put in a defence intituled in the action, but headed "Defence of the defendant Robert Chancellor Nesbitt," and containing the expressions, "this defendant does not admit," and "this defendant denies." The plaintiffs applied to a master at chambers for leave to sign judgment in default of defence on the ground that the statement of defence was irregular, and the matter was referred to

Ridley J. at chambers, who made an order that the plaintiffs should be at liberty to sign judgment unless the defendant Nesbitt amended his defence within a time named.

The defendant Nesbitt appealed.

English Harrison, Q.C., and *Atkin*, for the defendant Nesbitt. The statement of defence as delivered was regular. It has been frequently pointed out that the effect of the provisions with regard to suing partners in their firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm, and that the plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names: *Western National Bank of City of New York* v. *Perez, Triana & Co.* (1); *Heinemann & Co.* v. *Hale & Co.* (2) That being so, the defendant Nesbitt was entitled to deliver a separate statement of defence as being his defence to the action like any other defendant sued jointly with others. In this case, the defendant Malleson having died since the commencement of the action, the defendant is really the sole defendant, and has pleaded accordingly. Order XLVIII. *a*, r. 5, provides that, "where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm." The first part of this rule shews that the action in such a case is really against the partners individually, and the latter part of the rule only means that the action shall continue after appearance under the same title, i.e., as an action against the defendants in their firm name. The statement of defence complies with that provision, as it is headed with the name of the action as described in the writ. In an action against partners in the firm name it is clear that the partners may sever in their defence. Where a partnership existed at the time of the accrual of the cause of action, the partners may be sued in the firm name, though the partnership has been dissolved when the writ is issued. In such a case each defendant would not have authority to deliver a defence for the partnership, but

(1) [1891] 1 Q. B. 304. (2) [1891] 2 Q. B. 83.

C. A. 1899

ELLIS v. WADESON.

only for himself: see Order XLVIII. *a*, r. 1. There was a substantial difficulty in the defendant Nesbitt's delivering a defence purporting to be the defence of the partnership, as it might have prejudiced the personal representatives of the deceased partner. [He cited *Taylor* v. *Collier*. (1)]

G. Spencer Bower, for the plaintiffs. The statement of defence delivered is irregular. The object of the provisions as to suing partners in their firm name is that a plaintiff shall not be embarrassed in suing by questions as to who are the individual partners constituting the firm. The procedure given may be a compendious mode of suing the individuals who constitute the firm, but it is intended that the individuals shall be unnamed. The action is against the partners in the firm name, and the judgment has to be against them in the firm name; and it is directly contrary to the whole scheme of Order XLVIII. *a*, that a statement of defence should be delivered as that of an individual partner. The latter part of Order XLVIII. *a*, r. 5, clearly shews that to be so. [He cited *Jackson* v. *Litchfield* (2); *Tomlinson* v. *Broadsmith*. (3)]

Atkin, in reply.

The judgment of the Court (A. L. Smith, Collins, and Romer L.JJ.) was delivered by

ROMER L.J. The point involved in this case, so far as the immediate case before us is concerned, is not very important. It amounts merely to a question as to the form the statement of defence should have been put in; but many questions have arisen in the course of the application to us which we think we should deal with as a guide in future.

I will take first the case where a claim is brought against a partnership—a case of several partners. It may be a case where the partnership has been dissolved before action, but it is a case of partnership liability, where the claim arose during the partnership, and the plaintiff sues, as under the rules he is entitled to sue, the partnership as a partnership. What happens then with regard to the members of the partnership

(1) (1882) 30 W. R. 701. (2) (1882) 8 Q. B. D. 474.
(3) [1896] 1 Q. B. 386.

who defend? Seeing that it is a claim against the partnership, they ought, if they can agree, to put in one statement of defence. Suppose they cannot agree, what then? In our opinion it is clear that each partner who has appeared, and who must appear separately, is entitled to put in a separate statement of defence. Then the question is, what should the statement of defence be? In our opinion, in an action of this sort, the statement of defence should be a statement of defence of the firm; but in the case where the different partners cannot agree on one defence and a partner puts in a separate defence, the proper form would be: "Statement of defence of the defendants" so and so (stating the name of the partnership firm) "by" so and so, "one of the partners appearing in the action." Then it may be said, what is the plaintiff to do if he finds a series of inconsistent defences put in by the different partners? We think the answer is clear. To entitle him to judgment against the partnership, he must, to use a homely phrase, beat all the defences—that is to say, he must shew and satisfy the judge at the trial that not one of the defences prevents a judgment being entered against the partnership. What would happen if some of the partners did not appear at all? In case, say, one partner alone chooses to appear—he would be entitled and would be bound to put in a statement of defence of the partnership. He might if he chose add, "by" so and so, "one of the partners served and appearing"; but his defence would be the defence of the firm, and the action would go to trial upon that defence, and in that case judgment could be obtained against the partnership. Of course, if the partner chose to put in an improper defence and so rendered the partnership liable in a case where it ought not to be made liable, he might thereby, as between himself and his co-partners, be committing a breach of duty for which he would be liable to them, but, so far as the plaintiff is concerned, the plaintiff would be able to obtain judgment. Now, if judgment is obtained against the partnership, it can be enforced as against all the partners, and against the partnership assets; but there is this provision made—that suppose one of the partners has not been served and is ignorant of the existence of the action, then

C. A. 1899

ELLIS v. WADESON.

Romer L.J.

execution cannot be levied against him without giving him an opportunity of appearing, and the plaintiff must then satisfy the Court that he is liable as a partner: *Ex parte Young*. (1)

Now consider the question of death. Suppose a partner dies before action brought, and an action is brought against the firm in the firm's name. The dead man is not a party to the action, so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case. In that case the action would be an action solely against the surviving partners. At common law, if a creditor sued joint debtors and one died, the survivors only could be sued. Since the Judicature Act, undoubtedly, in the case of a partnership liability, the creditor might now join in one action the surviving partners, and the legal personal representatives of the deceased partner, but the latter would have expressly to be added as defendants. If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. I may mention that the reason why the partnership assets can be reached is because, notwithstanding the dissolution by death, the surviving partners for many purposes have authority continued to them to bind the dead man's interest in the partnership assets, for the authority of partnership extends to enable the surviving partners, in case of dissolution by death, to wind up the affairs of the partnership, to pay the partnership debts, to defend claims against the partnership, and so forth: see Lindley on Partnership, 5th ed. pp. 217, 218, and 587. Of course, with reference to the observation that in a proper case the legal personal representatives of a deceased partner can be sued, that would not apply to a case where the principle of "Actio personalis moritur cum personâ" applies, which appears, as far as we can see, to apply to the case before us.

I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between

(1) (1881) 19 Ch. D. 124.

service of writ and the trial of the action and judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets. With reference to this, I may refer to some cases in the Chancery Division with regard to judgments obtained against partners, one of whom died after judgment: see, for example, *Phillips* v. *Homfray* (1) and *In re Shephard.* (2) This is clear—that the partner who dies between writ and judgment is not before the Court, and therefore judgment could not be obtained against the deceased partner, or execution enforced against him or his assets. Supposing there were two partners, both living at the date of writ, and both were served, and both died before the action came on for trial, no judgment could be obtained.

Now apply these principles to the case before us. Nesbitt is the surviving partner; the action is a good action against the partnership; Nesbitt is entitled, and is bound in our opinion, to put in a statement of defence on behalf of the firm, nor does he by so doing make the deceased partner a party to the action. What should be the form of Nesbitt's statement of defence? It should be a defence of the firm, and he might add to the defence, "By Nesbitt, the sole surviving partner," though it would probably have been sufficient to have stated the fact that he had become a surviving partner in the body of the statement of defence. There is no reason why the statement of defence should not be in the form I have indicated, and Order XLVIII. *a*, r. 5, points to that. It is not merely a question of form: it is a question, to a certain extent, of substance, for the plaintiff, if he obtains a judgment making the firm liable, can issue execution not only against Nesbitt, but against the partnership assets which remain in Nesbitt's control or in his hands. It appears to us that the defence put in was wrong in substance. It is not a defence by the firm or one denying the firm's liability. In paragraph 6, for example, it states: "This defendant does not admit the allegations contained in paragraph 7 of the statement of claim"; and so in paragraph 7 of the defence: "This defendant denies each and every allegation in the statement of

(1) (1883) 24 Ch. D. 439. (2) (1889) 43 Ch. D. 131, at p. 136.

C. A. 1899

ELLIS v. WADESON.

Romer L.J.

claim." That statement of defence was wrong. He puts in a defence by "this defendant" alone in his personal capacity. He is not sued in his personal capacity, and he is not entitled to put in a personal statement of defence; he has to defend for the firm, and in the firm's name. It appears to us that the learned judge in the Court below, upon the defendant declining to amend the statement of defence, was right in the order that he made, and this appeal ought to fail. We will, however, give the defendant leave to amend his defence by making a defence on behalf of the firm within a reasonable time.

Appeal dismissed.

Solicitors for plaintiffs: *Crosse & Sons.*
Solicitor for defendant: *N. Herbert Smith.*

A. M.

1899
March 18.

CRISP *v.* LONDON COUNTY COUNCIL.

Metropolitan Building—Dangerous Structures—Erection of Shores and Hoarding—Disturbance of Pavement—Duty to Restore Pavement after Hoarding Removed—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 106, 107.

Where the London County Council, acting under the powers conferred on them by Part IX. of the London Building Act, 1894, have, for the purpose of securing a dangerous structure, erected shores and a hoarding, and have taken up portions of the pavement to allow of the shores and the uprights of the hoarding being fixed in the ground, the duty of replacing the pavement after the shores and hoarding have been removed lies upon the owner of the premises and not upon the county council.

FURTHER CONSIDERATION before Wills J. after trial with a jury.

In December, 1895, the house situate at No. 8, Mansion House Street, Lambeth, was certified by the district surveyor under Part IX. of the London Building Act, 1894, to be in a dangerous state, and accordingly notice was served upon the owner of the house under s. 106 of that Act requiring him to do the works necessary to remove the danger. The owner having failed to comply with the notice, the defendants on

February 15, 1896, obtained an order of a metropolitan police magistrate under s. 107 ordering the owner to take down the dangerous parts of the front wall and do the other necessary works within fourteen days. Upon failure by the owner to comply with that order, the defendants in March, 1896, acting in pursuance of the powers conferred by ss. 106 and 107, entered upon the premises and took down the dangerous portions of the house and secured it. For that purpose the premises, which were unoccupied, were hoarded in, and inside the hoarding portions of the foot-pavement were removed to allow of the fixing of four uprights to support the hoarding and one shore to support the house. The defendants then applied for and received from the owner a sum of 11*l.* 7*s.* 9*d.* for the payment of their expenses in connection with the work. That sum included the cost of the timber used for the hoarding and uprights and the shore. The house was subsequently rebuilt by the owner, and after the rebuilding was completed the hoarding was removed, but the foot-pavement was not reinstated.

On August 7, 1897, the plaintiff Martha Crisp, while passing along the footway, caught her foot in a hole caused by the removal of one of the paving-stones and was injured. The plaintiff sued the defendants, charging them with negligence in omitting to see that the paving-stones were properly replaced, and also charging that they were wrongdoers in removing the pavement at all without first giving notice in writing to the Lambeth Vestry under s. 109 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). At the trial the jury found a verdict for the plaintiff for 40*l.* damages. The judge reserved the question of the defendants' liability for further consideration.

Dickens, *Q.C.*, and *Daldy*, for the defendants. First, there was no obligation on the defendants to obtain the consent of the vestry to the breaking up of the pavement. By s. 69 and the following sections of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), which received the royal assent the same day as the Metropolis Management Act, the duty of surveying dangerous structures and securing them was imposed

1899

CRISP v. LONDON COUNTY COUNCIL.

on the commissioners of police. They were thereby empowered to put up hoardings, and no notice was required to be given by them to the vestry before doing the work. And by s. 245 of the Metropolis Management Act it was provided that "nothing in this Act shall interfere with the powers given by law to commissioners of police of the metropolis." By the Metropolitan Building Act, 1869 (32 & 33 Vict. c. 82), the powers of the commissioners of police over dangerous structures were transferred to the Metropolitan Board of Works, and by s. 40, sub-s. 8, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), they were vested in the defendants. Sect. 109 of the Metropolis Management Act, 1855, which enacted that "no company or person shall break up or open the pavement . . . . without having previously given three clear days' notice in writing to such vestry," applied only to gas and water companies, and private persons engaged in building operations. That section did not apply to the breaking up of pavement for the purpose of securing a dangerous structure. The provisions as to dangerous structures were a code in themselves. This was the state of the law down to 1894. In that year the Metropolitan Building Act, 1855, was repealed by the London Building Act, 1894, which conferred upon the county council powers of dealing with dangerous structures similar to those which they had previously possessed. The Act of 1894 was a consolidation Act, and was not intended to alter the law in this respect. By s. 106 (1) the duty is cast upon the defendants of

(1) By s. 106 of Part IX. of the London Building Act, 1894, where the district surveyor certifies to the council that a structure is in a dangerous state, "the council may cause the same to be shored up or otherwise secured and a proper hoard or fence to be put up for the protection of passengers, and shall cause notice to be served on the owner or occupier of the structure requiring him forthwith to take down, secure, or repair the same as the case requires."

Sect. 107: "If the owner or occupier on whom the notice is served fail to comply as speedily as the nature of the case permits with the notice, a petty sessional court on complaint by the council may order the owner to take down, repair, or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the Court to be in a dangerous state within a time to be fixed by the order, and if the same be not taken down, repaired, or otherwise secured within the time so limited, the council may with all convenient speed cause all or so much of the structure as is in a dangerous

giving the owner of a dangerous structure notice to take down or secure it forthwith. In the event of the owner not complying with that notice, they may obtain a magistrate's order upon him under s. 107 to do the work within a time to be fixed by the order, and upon his failing to comply with the order they may do the work themselves. If the owner did the work himself in obedience to the notice of the defendants under s. 106, or if the magistrate ordered him to do the work forthwith, it would be impossible for him to give a three days' notice to the vestry. But if the owner of the premises would not be required to give notice to the vestry, a fortiori the London County Council would not be required to do so.

Secondly, there was no duty upon the defendants to see that the pavement was replaced after the hoarding was removed. The cost of the hoarding was charged by the defendants to the owner, and it thereupon became his property. The duty of the defendants was at an end when they had done what was necessary to make the building safe. The person who took away the hoarding and left the hole unfilled is the person liable.

Holloway, for the plaintiff. Sect. 109 of the Act of 1855 is precise that no person is to break up or open the pavement without notice to the vestry. That section is unrepealed. The defendants have acted under s. 107 of the Act of 1894, which gives no power to break open the pavement. Therefore they were bound to give notice under the Act of 1855 before doing so. Also, they were bound to do so under s. 32 of the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), by which "every person who shall intend to build or take down any house building or wall . . . . within ten feet of any public thoroughfare shall give notice of such intention to the vestry." Not having given notice under those sections, the defendants were trespassers. But whether they were

condition to be taken down, repaired, or otherwise secured in such manner as may be requisite."

Sect. 109: "All expenses incurred by the council in relation to the obtaining of any order as to a dangerous structure and carrying the same into effect under this part of this Act shall be paid by the owner of the structure."

1899

CRISP v. LONDON COUNTY COUNCIL.

trespassers or not, they were bound either to replace the pavement themselves, or to see that it was done.

Dickens, *Q.C.*, in reply. The defendants are not a "person" within the meaning of s. 32 of the London Council (General Powers) Act, 1890.

WILLS J. I have come to the conclusion that my judgment in this case must be for the defendants. It seems to me beyond doubt that s. 109 of the Metropolis Management Act, 1855, has no application to the case of a dangerous structure. That Act and the Metropolitan Building Act, 1855, received the royal assent on the same day, and each Act was presumably drafted in view of the provisions of the other. The latter Act having given to the commissioners of police the powers of dealing with dangerous structures which are now vested in the defendants, s. 245 of the former Act provided that nothing in that Act should interfere with the powers given by law to the commissioners of police. Therefore it is clear that under the Building Act there was no obligation on the commissioners of police to give notice to the vestry before taking up the pavement as incidental to the dealing with a dangerous structure. No doubt s. 245 of the Metropolis Management Act applies in terms only to the commissioners of police; but I think it must be understood as applying equally to any public body to whom the powers of the commissioners are transferred. The Building Act of 1855 is now repealed, and for it is substituted the London Building Act, 1894, which, however, contains provisions relating to dangerous structures practically identical with those of the earlier Act. These powers being practically a continuation of the old powers vested in the commissioners of police, I think that the saving clause of the Metropolis Management Act, s. 245, must still be regarded as protecting the defendants from the operation of s. 109. But whether s. 245 is still operative for that purpose or not is, I think, immaterial, for I cannot suppose that the Legislature, while re-enacting the former powers, meant to make any change in the conditions under which those powers were to be exercised. Further, I think that the Legislature intended that the part

of the Act of 1894 relating to dangerous structures should constitute a special and independent code by itself, and that, not only the county council, but the owner of the dangerous structure also, when called upon to take measures for securing the public from danger, should be exempted from the obligation of giving notice to the vestry before interfering with the pavement. It seems to me quite impossible for s. 109 of the Metropolis Management Act, 1855, to be worked along with the dangerous structure clauses of the Act of 1894. By s. 106 of the latter Act notice is to be served upon the owner requiring him to do the necessary work "forthwith," and it is obvious that obedience to that notice is quite inconsistent with his giving a three days' notice to the vestry. And though in the event of his not complying with the notice under s. 106 the magistrate may order the work to be done, not necessarily forthwith, but within a time to be fixed by the order, it is inconceivable that the requirement of notice to the vestry should apply in the one case and not in the other. It was indeed contended that, apart from the Act of 1855, the defendants were bound to give notice to the vestry under s. 32 of the London Council (General Powers) Act, 1890, which enacts that "every person who shall intend to . . . . take down any house, building, or wall . . . . within ten feet of any public thoroughfare shall give notice of such intention to the vestry." But I think it impossible to hold that the defendants are a "person" within the meaning of that section. I think it means "every person other than the London County Council." It remains to deal with the second question, whether there was a duty upon the defendants to reinstate the pavement after the hoarding had been removed. They have under Part IX. of the Act of 1894 power to take down, repair, or otherwise secure so much of the structure as is in a dangerous condition, and to do anything that is reasonably necessary to the carrying out of that power, including the erection of a hoarding for the protection of passengers. And where it is necessary, as was the case here, to take up the pavement for the purpose of erecting the shores or hoarding, they have power to do so. But when once they have erected the hoarding and

1899

CRISP v. LONDON COUNTY COUNCIL.

Wills J.

put the dangerous structure into a safe condition, their duty is, I think, at an end. The duty of taking down the hoarding and replacing the pavement lies upon the owner of the premises, as one of the ordinary duties attaching to the ownership of property. The Act does not say that the duty of the county council shall extend beyond the securing of the dangerous structure, and I think that the intention was that, after that has been done, the duty of seeing matters restored to their former condition should rest upon those whose interest it is to see that that is done. In my opinion the defendants are not liable for anything that may have been done or omitted to be done by any one else after they had finished their operation of securing the dangerous structure. There must be judgment for the defendants.

Judgment for the defendants.

Solicitor for plaintiff: *J. Mills.*
Solicitor for defendants: *Blaxland.*

J. F. C.

RITCHIE, Appellant *v.* LARSEN, Respondent.

1899
Jan. 26.

Ship—Seamen—Agreement for Service—Advance Note—Payment conditional on going to Sea—Amount exceeding one Month's Wages—Engagement Abroad—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 124, 140.

By the Merchant Shipping Act, 1894, s. 140, sub-s. 1, agreements with the crew which are required to be made in a form approved by the Board of Trade may contain stipulations for payment to seamen, conditionally on their going to sea, of not more than one month's wages.

By sub-s. 2, save as aforesaid, an agreement for payment to a seaman "conditionally on his going to sea from any port in the United Kingdom," is void, and money paid under it shall not be deducted from wages.

By s. 124, where a seaman is engaged at a foreign port, in which there is a British consular officer, the provisions of the Act respecting agreements made in the United Kingdom shall apply, subject to certain modifications.

A seaman was engaged at a foreign port, in which there was a British consul, and was paid a sum exceeding one month's wages, under an advance note, conditionally on his going to sea. In proceedings to recover wages the master claimed to deduct the whole amount paid under the advance note.

On a case stated by justices:—

Held, that s. 124 does not extend s. 140 to engagements of seamen abroad, and therefore s. 140 applies only to engagements to sail from the United Kingdom, and the master was entitled to deduct the whole amount.

Case stated by justices.

A complaint was made, before a justice of the peace, that the respondent, having entered into an agreement in writing, at Talcahuano, to serve as a seaman on board the British ship *Melville Island* (of which the appellant was master), on her voyage from Talcahuano to Swansea, at the wages of 3*l.* per month, and having duly performed the services required by the agreement, a certain sum was due to him (the respondent) for a balance of wages, and that the appellant had neglected to pay him that sum.

At the hearing the respondent was examined upon oath, and stated that he joined the British ship *Melville Island*, of which the appellant was master, as an A.B., at Talcahuano, that he signed articles there before the British consul, that he received

1899

RITCHIE v. LARSEN.

no money at Talcahuano, that the account produced (1) was a true account of his wages; and upon cross-examination he stated that he received an advance note, of which the following was a copy:—

"Advance Note.

"Talcahuano, 30 March, 1898.

"I promise to pay to the order of I. Larsen, seaman, shipped in the British ship *Melville Island*, of Glasgow, the sum of 4*l.* 10*s.* 0*d.*, 24 hours after the sailing of the said vessel from this port, provided said man proceeds to sea as per agreement.

"G. L. Ritchie, Master";

that he claimed 1*l.* 10*s.*, out of the 4*l.* 10*s.*, the amount of his advance note, and that an offer of payment of his wages, less 1*l.* 10*s.*, had been made to him, and he had refused to accept same.

The ship's articles and official log-book were put in, and it was admitted that the 4*l.* 10*s.* had been paid by the appellant, and that there was a British consular officer at Talcahuano.

The respondent's solicitor cited s. 140 of the Merchant Shipping Act, 1894, and contended that only a sum not exceeding the amount of one month's wages (namely, 3*l.*) could be deducted from the respondent's wages under the agreement entered into by him, as provided by sub-s. 1 (*a*) of s. 140, and that by sub-s. 2 any other agreement "by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom, shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages," &c.

He also cited s. 124 of the same statute, and further contended that, the respondent being a seaman engaged abroad in a port at which there was a British consular officer, before whom the respondent was engaged, the provisions of the Merchant Shipping Act, 1894, respecting agreements with the crew made in the United Kingdom, should apply to the engagement of seamen abroad, as in the case of the respondent.

(1) A copy of the account was set out in the case. The only item here material was "To advance on joining 4*l.* 10*s.* 0*d.*"

1899

RITCHIE v. LARSEN.

The appellant's counsel contended that s. 140 of the Act related only to seamen engaged in, and going to sea from, any port in the United Kingdom, and did not apply to seamen engaged abroad, and that s. 124 should not be read together with s. 140, which was a separate and distinct enactment, applicable to seamen shipped in, and sailing out of, the United Kingdom only.

The justices were of opinion that ss. 140 and 124 should be read and construed together, and that, the respondent having been engaged abroad before a British consular officer, as provided by s. 124, the provisions respecting agreements with the crew, as enacted in s. 140, should apply in this case, and they adjudged that the payment made by the appellant in excess of 3*l.*, the amount of monthly wages payable to the respondent under his agreement, conditionally on his going to sea from the port of Talcahuano, was void, and they ordered that the sum of 1*l.* 10*s.* should be paid by the appellant to the respondent.

If the Court should be of opinion that the justices' decision was right, the order was to stand; but if the Court should be of opinion that the justices' decision was wrong, and that they should not have made the order, the Court was to quash the order, and make such other order or direction as to the Court should seem meet.

J. A. Hamilton, for the appellant. The justices placed a wrong interpretation on the Merchant Shipping Act, 1894, (57 & 58 Vict. c. 60). (1) They were wrong in holding that ss. 124 and 140 ought to be read together. The two sections are separate and distinct enactments, and the prohibition contained in s. 140, sub-s. 2, is expressly confined to agreements by seamen going to sea from ports in the United Kingdom, and cannot be impliedly extended to the case of seamen engaged abroad. Sect. 124 is intended to extend such provisions as those relating to engagement of seamen, contained in ss. 113–115, to cases of engagement abroad. The object of the Act is the protection of seamen, as is shewn by the

(1) The provisions of the Act on which the decision turned are set out in the judgment of Channell J., post, pp. 731–733.

1899

RITCHIE v. LARSEN.

provisions of ss. 110–112, relating to licences to supply seamen, and ss. 212–219, as to protection of seamen from imposition. The prohibition, which is intended to protect the seaman, might have the effect of inflicting hardship on him, if extended to cases of engagement in foreign ports, where British legislation does not apply, where it may be more difficult to get an engagement than it would be in a British port, and where, possibly, the seaman may be unable to get away from the port, unless he can raise some ready money by means of an advance note. This view is fortified by a comparison of the Act of 1894 with the numerous earlier statutes which it repeals and re-enacts. If it had been intended to apply the provisions of s. 140 to cases of engagement abroad, this would have been done by express enactment. The view adopted by the justices is prejudicial to the interests of both shipowners and seamen.

Montague Lush, for the respondent. The justices have adopted the only interpretation which can reasonably be placed upon the Act. Sects. 124 and 140 ought to be read together. Sect. 140, relating to advance and allotment of wages, is a provision "respecting agreements with the crew made in the United Kingdom," within the meaning of s. 124, and therefore is applied by that section to a case where a seaman is engaged at a port in which there is a British consular officer, and its application is not limited by any of the modifications contained in clauses (*a*), (*b*), and (*c*) of sub-s. 1. The effect of the two sections taken together was to entitle the respondent to enter into a stipulation for payment to him, conditionally on his going to sea, of a sum not exceeding the amount of one month's wages, that is 3*l.*, and no more, and therefore the stipulation for the payment of 4*l.* 10*s.* was void, and the appellant had no right to deduct the balance of 1*l.* 10*s.*

J. A. Hamilton was not heard in reply.

CHANNELL J. I have been asked to give judgment first in this case. I have formed a clear opinion, quite apart from any consideration as to the intention of the Legislature, but looking only to the language of the Act of Parliament, that the decision

of the magistrates was wrong; if, however, one does take into consideration the probable intention of the Legislature, that rather corroborates the view which I take. In considering the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which are material to the present inquiry, I will begin with s. 113. That section provides as follows, sub-s. 1: "The master of every ship, except ships of less than 80 tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act, with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom"; and sub-s. 2 imposes a penalty for breach of sub-s. 1. That section is equivalent to a provision that the master of every ship, except small coasting vessels, shall enter into agreements with the crew. Then by s. 114, sub-s. 1, "An agreement with the crew shall be in a form approved by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before a seaman signs the same." Therefore, taking ss. 113 and 114 together, the effect is, that every agreement, except those relating to small coasters, must be in a form approved by the Board of Trade. Then by s. 114, sub-s. 3, "The agreement with the crew shall be so framed as to admit of such stipulations, to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law." Then s. 115 is very important. By that section, "The following provisions shall have effect, with respect to the agreements with the crew made in the United Kingdom, in the case of foreign-going ships registered either within or without the United Kingdom:

"(1.) The agreement shall (subject to the provisions of this Act as to substitutes) be signed by each seaman in the presence of a superintendent." Then follow a number of provisions relating to the making and attestation of agreements. All the provisions of s. 115 relate on the face of them to agreements with seamen engaged in the United Kingdom, and cannot apply, without some further provision, to agreements with seamen

1899

RITCHIE v. LARSEN.

Channell J.

engaged elsewhere, because the agreements dealt with are to be made before a superintendent, who is in the United Kingdom. The next material section is s. 124, by which (sub-s. 1) "With respect to the engagement of seamen abroad, the following provisions shall have effect:—

"Where the master of a ship engages a seaman in any British possession other than that in which the ship is registered, or at a port in which there is a British consular officer, the provisions of this Act respecting agreements with the crew made in the United Kingdom shall apply, subject to the following modifications: (*a*) In any such British possession the master shall engage the seaman before some officer, being either a superintendent, or, if there is no such superintendent, an officer of customs; (*b*) At any such port having a British consular officer, the master shall, before carrying the seaman to sea, procure the sanction of the consular officer, and shall engage the seaman before that officer"; and then follows a clause relating to indorsement of attestation upon the agreement. It is quite clear that the main object of s. 124 is to provide, in the case of seamen who are engaged abroad, for matters which are dealt with by s. 115 in the case of seamen engaged in the United Kingdom. This is shewn by the modification, substituting somebody else for the superintendent referred to in s. 115. The other modifications relate also to the mode of signature or attestation of the agreement, and not to the terms of it. The next provision which requires examination is s. 140, on which this case mainly turns (sub-s. 1 (*a*)): "Where an agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement; and (*b*) Stipulations for the allotment of a seaman's wages may be made in accordance with this Act." Sub-s. 2. "Save as aforesaid, an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman, conditionally on his going to sea from any port in the United Kingdom,

shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages, and a person shall not have any right of action, suit, or set-off, against the seaman or his assignee in respect of any money so paid or purporting to have been so paid." Mr. Lush contends, and I think rightly, that by the terms of s. 124, s. 140 applies to agreements with respect to the engagement of seamen abroad made in British possessions or at a foreign port in which there is a British consular officer, as well as agreements to sail from a port in the United Kingdom. So it does; but the words of sub-s. 2 of s. 140 as to what is forbidden are not thereby altered. Sect. 140, sub-s. 1 (*a*), expressly permits a stipulation for payment to a seaman, conditionally on his going to sea, of a sum not exceeding one month's wages; but it does not expressly provide that the agreement is to be void if the stipulation relates to a sum exceeding a month's wages. If there were no express provision as to this, one would probably come to the conclusion that a provision to that effect was implied, and that an agreement containing a stipulation for payment relating to more than a month's wages would be void; but there is an express prohibition contained in sub-s. 2, by which "save as aforesaid" certain agreements for payment conditionally on going to sea are made void, and that prohibition is expressly confined to agreements conditional on sailing "from any port in the United Kingdom." It may apply to agreements relating to small coasters; but it applies also to an agreement which is to be in a form approved by the Board of Trade. Then what is forbidden by s. 140, sub-s. 2? An agreement for payment conditionally on going to sea from any port in the United Kingdom, except in the case of the stipulation allowed by sub-s. 1 (*a*). There is no prohibition unless the condition is that the seaman is to ship from a port in the United Kingdom. Then if we turn back to s. 124, there is nothing in that section contrary to our view. The agreement with the seaman in this case had to be in the form approved by the Board of Trade, because there was a British consul at Talcahuano, but the form approved permits such stipulations as to advance of wages as are not contrary to law, and conditions as to shipping from a

1899

RITCHIE v. LARSEN.

Channell J.

foreign port are not contrary to law so far as I can see. Therefore it seems to me that, if we look at the language of the Act of Parliament, there is no clause forbidding a condition such as that which was made in the present case. On that ground I am clear that the condition is not void. Then if we look to the intention of the Legislature, the object is to forbid advances beyond a certain amount where the shipment is from a port in the United Kingdom, where seamen are protected from the impositions of crimps by our law, but not from a foreign port, for there is no power on the part of the Legislature to provide for the protection of seamen in foreign ports, and it might happen that a seaman might be detained at a foreign port for a debt exceeding the amount of a month's wages, and might have no means of getting away from the port, unless by obtaining an advance note, such as was given in the present case.

For these reasons I am of opinion that the order of the justices directing payment by the appellant to the respondent of the sum of 1*l.* 10*s.* ought to be quashed, and judgment entered for the appellant.

LAWRANCE J. concurred.

Judgment for the appellant. (1)

Solicitors for appellant: *William A. Crump & Son.*

Solicitor for respondent: *Richard White, for Jones & Treharne, Swansea.*

(1) See next case.

P. B. H.

ROWLANDS, Appellant; MILLER, Respondent.

1899
Feb. 11, 17.

Ship—Seamen—Wages—Advances—Assignment—8 *Geo.* 1, *c.* 24, *s.* 7—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 163.

By 8 Geo. 1, c. 24, s. 7, no master or owner of any merchant ship or vessel shall pay or advance to any seaman, during the time he shall be in parts beyond the seas, any money on account of wages exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to Great Britain or Ireland, or to some of His Majesty's dominions whereto they belong, under a penalty of double the money so paid or advanced to be recovered in the Admiralty Court by any person who shall first discover and inform of the same:—

Held, that this enactment did not apply to the terms upon which a seaman was engaged where his engagement took place in a foreign port, nor prevent a master from engaging a seaman in a foreign port on the terms that he should be paid a sum down on joining the ship and the remainder of his wages at the end of the voyage:

Also, that if the enactment did apply, the seaman could not recover again as unpaid wages the sum advanced to him in excess of the moiety allowed by the statute.

Sect. 163 of the Merchant Shipping Act, 1894, enacts that, as respects wages due or accruing to a seaman, an assignment or sale thereof made prior to the accruing thereof shall not bind the person making the same; a power of attorney or authority for the receipt thereof shall not be irrevocable; and a payment of wages to the seaman shall be valid in law, notwithstanding any previous sale or assignment of those wages.

Upon engaging a seaman in a foreign port the master agreed to advance to him a sum on account of wages; the seaman signed a document giving a third person authority to receive that sum, and the master paid it to the third person with the authority of the seaman to make such payment:

Held, that s. 163 did not apply to make this transaction void, and that the seaman was not entitled to recover from the master the sum so advanced and paid.

Case stated, under the Summary Jurisdiction Acts, by two justices of the borough of South Shields sitting as a court of summary jurisdiction.

The respondent took proceedings before the justices, under s. 164 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), to recover from the appellant the sum of 11*l.* 0*s.* 6*d.*, being the balance of wages alleged to have been earned by, and to be due to, the respondent as an able seaman on board the sailing ship

1899

ROWLANDS v. MILLER.

Hutton Hall, of which the appellant was master, on a voyage from San Francisco to Antwerp and the Tyne.

From the facts stated in the case it appeared that, whilst the vessel was lying at San Francisco, the appellant engaged one Herman, a crimp, to find a crew for her. The respondent was one of the crew so found by Herman, and was engaged by the appellant on the terms that he should receive, in respect of wages, at the rate of 4*l.* per month, an advance of $40, equivalent to 8*l.* 5*s.* 8*d.* Thereupon the following note was drawn up—it was not clear by whom—and passed from the respondent to Herman :—

"$40. San Francisco, April 11th, 1898.

"Received on board the ship *Hutton Hall* Fred Miller as seaman who acknowledges to having shipped and received the sum of forty dollars in advance and who hereby assigns this note to Mr. Herman. Officer Commanding."

The following indorsement was on the note :—

"San Francisco, April 11th, 1898.

"For value received I hereby assign this note to Mr. Herman.

"Fred Miller."

The respondent, Miller, stated before the justices that he got no money from Herman, but only some odds and ends towards an outfit. [It was not clear from the statement of the case whether the justices intended to find as a fact that Herman received from the appellant the sum of $40 ; but, as will be seen, the case was argued in the Divisional Court on the assumption that Herman had received that sum.] On the arrival of the vessel in England, the respondent was offered his wages for the voyage, less 8*l.* 5*s.* 8*d.* deducted in respect of the alleged advance at San Francisco. He refused to accept that offer, and took these proceedings before the court of summary jurisdiction.

The justices were of opinion that s. 140, sub-s. 1, of the Merchant Shipping Act, 1894 (1), applied to advances made to

(1) 57 & 58 Vict. c. 60, s. 140, sub-s. 1 (*a*) : "Where any agreement with the crew is required to be made in a form approved by the Board of Trade, the agreement may contain a stipulation for payment to or on behalf

seamen shipped at any place, whether at home or abroad, and controlled the operation of s. 163 (1), which, it was contended before them, also applied, and they adjudged the appellant to be entitled to deduct one month's wages only from the respondent's claim.

The questions for the opinion of the Court were thus stated:—

1. "Are we correct in our interpretation of s. 140, sub-s. 1, as applicable to this case, which we held to authorize an advance to the extent of one month's wages no matter where the ship may be in which the seaman is about to sail? And, if so, were we right in allowing a deduction of one month's wages only?"

2. "Is s. 163 controlled by s. 140? If not, and the Court shall be of opinion that s. 163 altogether prohibits advances anywhere out of the United Kingdom, then the respondent shall be entitled to receive the whole balance of his wages properly due to him without deducting any part of the alleged advance of two months' wages."

3. "If the Court shall be of opinion that we were wrong in our interpretation of these two sections, and there is no limit

---

of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement."

"(*b*) Stipulations for the allotment of a seaman's wages may be made in accordance with this Act."

"(2.) Save as aforesaid an agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman conditionally on his going to sea from any port in the United Kingdom shall be void, and any money paid in satisfaction or in respect of any such agreement shall not be deducted from the seaman's wages, and a person shall not have any right of action, suit, or set-off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid."

(1) 57 & 58 Vict. c. 60, s. 163:

"(1.) As respects wages due or accruing to a seaman or apprentice to the sea service:

"(*a*) they shall not be subject to attachment or arrestment from any Court;

"(*b*) an assignment or sale thereof made prior to the accruing thereof shall not bind the person making the same;

"(*c*) a power of attorney or authority for the receipt thereof shall not be irrevocable; and

"(*d*) a payment of wages to the seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of those wages, or any attachment, incumbrance, or arrestment thereof."

"(2.) Nothing in this section shall affect the provisions of this Act with respect to allotment notes."

1899

ROWLANDS v. MILLER.

to advances which may be made to seamen abroad, and that the advance was lawfully and properly made, and is not otherwise void for want of the appellant's signature making it binding on him, then our order is to be reversed to the extent of 8*l.* 5*s.* 8*d.*, the advance claimed to have been made."

Horridge, for the appellant. The decision of this Court in *Ritchie* v. *Larsen* (1) governs the present case. Sect. 163 of the Merchant Shipping Act, 1894, does not apply to the advance notes or allotments dealt with by ss. 140, 141, 142; it applies to (*b*) assignments of wages, and (*c*) authorities for the receipt thereof, made by the seaman after he has signed articles, and before any payment has been made under the assignment or authority to receive. The effect is to provide that such assignments or authorities shall not bind the person making them or be irrevocable before payment of wages, and (*d*) that payment to the seaman shall be valid notwithstanding any previous assignment. Sub-s. 2 expressly saves ordinary allotment notes, which are dealt with separately by ss. 141, 142, and are really assignments, from the operation of s. 163. There is nothing in s. 163 which renders invalid an assignment where it has been acted upon and payment has been made under it. Here it must be taken, on the magistrates' findings, that the respondent authorized Herman to receive payment of the 8*l.* 5*s.* 8*d.*, and that that sum was in fact paid to Herman. It is immaterial that the note of April 11, 1898, was not signed by the appellant. The indorsement was not an assignment affected by the provisions of s. 163. The limitation with respect to one month's wages contained in s. 140, sub-s. 1 (*a*), does not apply at all, because the seaman was shipped at a foreign port. The magistrates were wrong in not allowing the appellant to deduct the whole of the 8*l.* 5*s.* 8*d.*

J. D. A. Johnson, for the respondent. For the purposes of the argument it may be taken that the 8*l.* 5*s.* 8*d.* was paid to Herman. It was paid in respect of "wages due or accruing" to the respondent within the meaning of s. 163. The indorsement on the note was an assignment or authority to receive

(1) Ante, p. 727.

within that section, and therefore did not bind the respondent. In *Ritchie* v. *Larsen* (1) the attention of the Court was not called to s. 163; so that this case is not governed by that decision. Sect. 163, which is substantially a re-enactment of s. 233 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), was intended for the protection of seamen against imposition. Sects. 112, 156, and 178 of the Act of 1894 shew how that object is aimed at throughout. The transaction in question is within the mischief of s. 163. It comes within sub-s. 1 (*b*) and (*c*), and is contrary to law, and void as against the seaman. Sect. 155 shews what is meant by "wages accruing" to a seaman; it provides that his right to wages is to be taken to begin either when he commences work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens. Sect. 163, sub-s. 1 (*b*) and (*c*), makes all advance notes, after wages begin to accrue, void as against the seaman, and it is submitted that the note and indorsement of April 11, 1898, was an advance note in respect of wages due or accruing.

Next, s. 7 of 8 Geo. 1, c. 24 (2), applies. This was an advance to the seaman of a sum exceeding the moiety of the wages which were due to him at the time of such advance, and it is made illegal by s. 7, which has never been repealed.

(1) Ante, p. 727.

(2) 8 Geo. 1, c. 24, s. 7: "And for prevention of seamen or mariners deserting merchant ships or vessels abroad in the plantations, or in any other parts beyond the seas, which is the chief occasion of their turning pirates, and of great detriment to trade and navigation, and is chiefly occasioned by the owner or owners of ships or vessels paying wages to the seamen or mariners when abroad: Be it enacted by the authority aforesaid, that no master or owner of any merchant ship or vessel shall pay or advance, or cause to be paid or advanced, to any seaman or mariner, during the time he shall be in parts beyond the seas, any money or effects upon account of wages, exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to Great Britain or Ireland, or the plantations, or to some other of His Majesty's dominions whereto they belong, and from whence they were first fitted out; and if any such master or owner of such merchant ship or vessel shall pay or advance, or cause to be paid or advanced, any wages to any seaman or mariner above the said moiety, such master or owner shall forfeit and pay double the money he shall so pay or advance, to be recovered in the High Court of Admiralty, by any person who shall first discover and inform of the same."

1899

ROWLANDS v. MILLER.

Horridge, in reply. Sect. 7 of 8 Geo. 1, c. 24, does not apply to seamen shipped in a foreign port. If it did apply, a specific remedy is given. The master is made subject to a penalty, but the advance is not treated as a void transaction so as to entitle the seaman to sue the master for the amount advanced, and obtain that amount again.

Cur. adv. vult.

Feb. 17. The following judgment was read by

CHANNELL J. This was a case stated by justices on proceedings before them taken by a seaman under the Merchant Shipping Act, 1894, to recover wages claimed by him, and it raised a question very similar to that in a case of *Ritchie* v. *Larsen* (1), decided by us on January 26 last. The magistrates, however, in the present case based their decision on s. 163 of the Act of 1894, a section to which our attention was not called on the argument of the former case, and in addition our attention was called by counsel for the respondent in the present case to the statute 8 Geo. 1, c. 24, the 7th section of which appears to be still in force, through almost all the Act has been repealed. It became necessary, therefore, for us to consider not only whether the present case differed in any essential particular from the former case, but also whether our former decision was correct. We accordingly took time to consider the matter. In *Ritchie* v. *Larsen* (1) we decided that advances to seamen conditional on their shipping from a foreign port, although there was a British consul there, were not forbidden by the combined effects of ss. 124 and 140 of the Merchant Shipping Act, 1894. We assumed that they were not forbidden by any other statute, as none was called to our attention. Our former judgment was given immediately on the conclusion of the argument, as the case then appeared quite clear. I have now fully reconsidered the whole matter, and I am confirmed in the view I took on the former occasion as to the effect of the sections which we then had under consideration. I still think the effect of those sections is clear, and I think it unnecessary to repeat what I then said. I have

(1) Ante, p. 727.

also come to the conclusion, though with considerable doubt, that the sections to which we have since been referred do not affect the matter, and that our former decision was correct. I will deal first with the old statute 8 Geo. 1, c. 24, which was an "Act for the more effectual suppression of Piracy." I think the 7th section of that statute is certainly unrepealed. It is printed in the Revised Edition of the Statutes, the rest of the Act being omitted. In the Law Reports Index of Statutes repealed the other sections are shewn to be repealed, but this is not. It is also referred to as existing in most of the editions of Abbott on Shipping down to the 11th, though it has been dropped out in the two last editions, apparently because it is considered superseded rather than repealed. The words of the 7th section of that Act are as follows: [The learned judge read s. 7.]

Now I think, reading this as a whole, and noting that the object is to prevent desertion, that it does not apply to the terms of the engagement of seamen abroad. It applies to seamen already on the ship on its touching at the foreign port, and it forbids payment to them there of more than half of the money which has then become due to them in respect of the outward voyage, and the advancing to them of any future wages, with the object of giving them substantial inducement to remain on the ship for the homeward voyage. I do not think this enactment prevented a master from engaging a man in a foreign port, on the terms that he should be paid so much money down on joining the ship, and the balance at the end of the voyage. That might be the only means of replacing deserters, and it could not increase pirates. Even if this view is wrong, I think the only consequence of a breach of this enactment would be that an informer might sue in the Admiralty Court. The case would probably come within the rule that, where an enactment and a penalty for breach of it are contained in the same clause, the penalty is the only remedy for the breach; but, in any case, it seems to me that it would be impossible for a seaman, who had been paid in a foreign port a sum in excess of the moiety allowed by this enactment, to sue successfully on his return to this country for his whole wages. That would make the master forfeit the

1899

ROWLANDS v. MILLER.

Channell J.

sum paid to the seaman as well as forfeiting double the sum to the informer, or treble the sum altogether. I think, therefore, that this enactment does not forbid an advance to a seaman engaged abroad; and, further, that if it did it would not enable a seaman to recover the sum advanced again as unpaid wages, but would merely enable him, or any other informer, to recover double the money as a penal sum in the Admiralty Court.

Next, to deal with the 163rd section of the Merchant Shipping Act, 1894. This is as follows: [The learned judge read s. 163.]

It is contended that clauses (*b*) and (*c*) of sub-s. 1 of this section in effect make advance notes void as against the seaman; and, further, that even if that is not so in all cases, at all events the transaction described in the particular case submitted to us was invalid.

It is convenient to consider first the general question, and then see how far the present case differs from the ordinary one. Advances and advance notes have been known for many years, and have been for many years the subject of legislation. They have been dealt with in a separate part of this very statute, and it is unlikely that it could have been intended to alter the effect of that part of the statute by any section coming in a later part, and not mentioning advances. Sub-sect. 2 saves allotments under the Act from the operation of the section, and it was necessary to do so as they are clearly assignments. If advance notes were within the section one would expect that the advance notes authorized by s. 140, sub-s. 1, would be excepted, but they are not. Now it seems clear that, unless s. 140 does so, there is no section of this Act, nor any Act (other than that of George I. with which I have dealt), which in any way forbids a contract by a master with a seaman whom he engages abroad to pay that seaman a sum on account of his wages immediately on his joining the ship. Sect. 163 could only touch payments, not to the seaman, but to some one on his behalf and by his order, and then only if the transaction were an assignment by the seaman of wages before they had accrued due, or an authority to receive wages. Now, advance notes really are not mere assignments. The master generally makes himself liable conditionally to a third party, the holder of

the note. It is true that it has been held in *Cardiff Boarding Masters' Association* v. *Cory & Sons* (1), that advance notes promising to pay the seaman "or order" are not negotiable instruments because they are conditional. But they may be so framed as to be payable directly to the third person either by name or on his fulfilling a condition: see *McKune* v. *Joynson*. (2) I think that advance notes signed by the master in any of the usual forms cannot be considered merely as assignments by the seaman. There is another ground on which they might be considered as not coming within s. 163. That section relates, according to its heading, to "wages due or accruing due." Now wages cannot strictly be considered to be "accruing" until the service has commenced; consequently a sum contracted to be paid when the seaman ships on board, and conditionally upon his so shipping, cannot in strictness be said to be a sum which before he ships is "accruing," notwithstanding that if it becomes payable it is to be taken into account as part of his wages. This is perhaps somewhat fine; but to hold that s. 163 is confined to dealings with wages after the service has commenced brings about a result which accords with what appears to be the scheme of the Act, and leaves advances and agreements as to advances made before the commencement of the service to be governed by the earlier section of the Act. On the whole, I come to the conclusion that advance notes signed by the master and in an ordinary form are not struck at by s. 163, and that our decision in *Ritchie* v. *Larsen* (3) was correct. Before dealing with the facts of the present case, there is another point to be noted in reference to s. 163. It does not contain the words which are in s. 140, that money paid under the documents referred to shall not be deducted from the seaman's wages, and that a person paying shall have no right of action or set-off against the seaman. I think, therefore, that a payment made under an assignment before it is avoided, or a power of attorney or authority before it is revoked, must be good. Take clause (*c*) of s. 163, sub-s. 1, as to powers of attorney not being irrevocable. This would seem to mean that they should not

(1) (1893) 9 Times L. R. 388. (2) (1858) 5 C. B. (N.S.) 218.
(3) Ante, p. 727.

1899

ROWLANDS v. MILLER.

Channell J.

be irrevocable by reason of the party in whose favour they have been given having an interest in the money, but not that they should be revocable after payment had been made under them. In the same way I think assignments under clause (*b*), which are declared not binding on the seaman, must be voidable only and not void, and consequently could not be avoided after they had been acted on. This latter point might perhaps be doubtful, inasmuch as the master paying must necessarily have notice of the invalidity (if it exits), as it is created, if at all, by the statute.

Now to deal with the facts of the present case. The case first states it was one of the terms of the engagement of the respondent by the appellant that the respondent should receive an advance of $40. At common law such a contract would of course be good, and I have failed to find any statute forbidding it. The case then states that thereupon a document set out in the case was made out. It is dated April 11, 1898, and it purports to state that the respondent admitted having shipped. Probably, however, he had not done so, as it appears from the next paragraph of the case that he did not get his outfit until after signing. The document is not signed by the appellant. The facts are not at all clearly stated, and the documents are not easy to construe. The documents, however, whether an assignment or not, and whether an assignment of wages made before they had accrued due, appear certainly to amount to an authority to receive the money. The case states in the early part that there was no evidence of payment; but Mr. Horridge, for the appellant, contended that later on in the case the magistrates had assumed the payment, and had decided the case on the assumption that the $40 had been paid to Herman; and although Mr. Johnson at first contended the contrary, upon our proposing to send back the case to the magistrates to clear up this point, he elected to argue the case upon the footing that the money had been paid to Herman. That being so, it seems to me that the $40, which by a valid contract between the respondent and the appellant was to be paid to the respondent, was paid to Herman by the respondent's actual authority. It is stated that the respondent made no objection, and there is nothing to indicate that he did so until long after it was paid,

if it ever was paid. Under these circumstances it seems to have been a valid part payment of his wages, and there is nothing in the statutes empowering him to recover it over again.

If we were to assume that the money was not paid, but that the appellant was merely relying on a supposed liability to Herman, I should have great doubt on the case. I do not think the facts stated in the case shew a liability of the appellant to Herman. The appellant, not having signed the document, was not directly pledged by it to pay. It is doubtful whether it is an assignment, and if an assignment, whether it is an assignment of a debt already due, or of accruing wages which had not at the time actually accrued. If it had not been agreed that we should decide the case on the assumption that the money had been paid, I should think it necessary to remit the case to the magistrates to find further facts. As it is, I think the appellant was entitled to deduct the whole sum paid, and that judgment should be given for him.

The answers to the three questions put in the case should be :—

1. The magistrates were not right in allowing a deduction of one month only.

2. Sect. 163 of the Merchant Shipping Act, 1894, does not prohibit advances at all.

3. There is no limit to advances made abroad, and in this case on the facts agreed the payments were by respondent's authority, and were binding on him.

The judgment is that the appellant is entitled to deduct a further 4*l.* 2*s.* 10*d.* beyond the deduction allowed by the magistrates, and the respondent must pay the costs.

LAWRANCE J. concurred.

Judgment for the appellant.

Solicitors for appellant: *Walker, Son & Field, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

Solicitors for respondent: *Pattinson & Brewer, for Robert Jacks, South Shields.*

1899
Jan. 27.

BEARDSLEY *v.* BEARDSLEY and Others.

Estoppel—Res Judicata—Will—Validity—Probate Action—Citation of Parties—The Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 63.

Where the heir-at-law of a testator is made defendant, as one of the testator's next of kin, in a probate action to establish his will, and appears and contests its validity in the action, he cannot afterwards dispute the validity of the will in respect of real estate affected by it, notwithstanding that he was not cited to appear in the action as heir-at-law.

Decision of a point of law raised by the pleadings in an action for possession of land.

The statement of claim alleged that one Solomon Beardsley, on February 15, 1897, was seised in fee and in possession of a freehold messuage, and that on the same day he died, so seised and possessed thereof, intestate as regarded the same premises; that the plaintiff was the eldest son and heir of Solomon Beardsley and entitled to the possession of the premises, and that after Solomon Beardsley's death the defendant wrongfully took possession, pretending to be entitled thereto under an alleged will of Solomon Beardsley, and wrongfully withheld possession from the plaintiff.

The plaintiff claimed possession of the premises and mesne profits.

The statement of defence delivered by Mary Elizabeth Beardsley, one of the defendants, denied that Solomon Beardsley died intestate, and alleged (inter alia) that she was his widow, and entitled under his will to the premises for her life or widowhood; that in June, 1897, an action was brought in the Probate, Divorce and Admiralty Division of the High Court of Justice, in which action the defendant Mary Elizabeth Beardsley was plaintiff and the plaintiff in the present action and others were defendants, for the purpose of having the will of Solomon Beardsley established; that the present plaintiff duly entered an appearance in that action, and delivered a

defence therein, and was represented by counsel, and was himself present at the trial of the action, in which judgment was given in December, 1897, and a final decree pronounced for the force and validity of the will, and that by reason thereof the present plaintiff ought not now to be heard to impeach the force or validity of the will, or the title of the present defendant, Mary Elizabeth Beardsley, to the premises in question under and by virtue thereof.

The reply alleged (inter alia) that the present plaintiff was a party to the probate action in 1897, not as heir-at-law, but as one of the next of kin of Solomon Beardsley, and such action concerned the goods of the said Solomon Beardsley, and in no way related to his real estate; that the present defendant, Mary Elizabeth Beardsley, wholly neglected and refused to cite the present plaintiff as such heir-at-law to attend the proceedings in that action, or by summons or otherwise to make him a party thereto as heir-at-law of the deceased, and took no steps to give the Probate, Divorce and Admiralty Division jurisdiction to determine the validity of the alleged will and devise by Solomon Beardsley, deceased, of his real estate; and that by reason thereof the Probate, Divorce and Admiralty Division had no jurisdiction to decide, and did not decide, the validity of the alleged will, and the present plaintiff was no wise estopped or prevented from contesting the force and validity of the alleged will and devise by Solomon Beardsley of his real estate.

After delivery of the reply an order was obtained under Order XXV., r. 2, that the point of law raised by the pleadings be set down for hearing and disposed of before the trial of the action.

W. H. Stevenson, for the plaintiff. The plaintiff is not estopped or prevented by reason of the matters stated in the defence from maintaining this action. In respect of the real estate affected by the will, he is not bound by the judgment in the probate action, because he was not cited as heir-at-law. The Probate Court had no jurisdiction with respect to real estate until the passing of 20 & 21 Vict. c. 77. Sect. 61

1899

BEARDSLEY v. BEARDSLEY.

provides that the heir-at-law and devisees shall be cited where the will affects real estate, and by s. 62 they are bound by the decree pronounced. Sect. 63 provides that the decree shall not in any case affect the heir in respect of his interest in real estate unless he has been cited. (1) In actions to establish the validity of a will, it has been always the practice to cite the heir where the will affected real estate. An estoppel to be binding must be reciprocal: *Gaunt* v. *Wainman*. (2) Here the parties are not the same as in the probate action, because the trustees appointed by the will have been added. The dicta of Sir C. Cresswell, in *Emberley* v. *Trevanion* (3) have not been acted upon since that case. [He also referred to *Barrs* v. *Jackson* (4); *Young* v. *Ferrie* (5); *Lister* v. *Smith* (6); *Purdey* v. *Field* (7); *Domvile* v. *Domvile* (8); *Moore* v. *Holgate* (9); *Reg.* v. *Hutchings* (10); *Abouloff* v. *Oppenheimer*. (11)]

Hextall, for the defendant, Mary Elizabeth Solomon. The defence raised is good. The plaintiff was a party in the probate action, and is bound by the judgment. It was not necessary to cite him as heir-at law.

(1) 20 & 21 Vict. c. 77, s. 63: "Nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shewn to the Court and the Court is satisfied that the deceased was at the time of his decease seised of or entitled to or had power to appoint by will some real estate beneficially, or in any case where the will propounded or of which the validity is in question would not in the opinion of the Court, though established as to personalty, affect real estate, but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in real estate; provided that the probate, decree, or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

(2) (1836) 3 Bing. N. C. 69.

(3) (1860) 4 Sw. & Tr. 197; 29 L. J. (P. & M.) 142.

(4) (1842) 1 Y. & C. Ch. 585.

(5) (1859) 4 Sw. & Tr. 210; 29 L. J. (P. & M.) 69.

(6) (1862) 3 Sw. & Tr. 53; 32 L. J. (P. & M.) 13.

(7) (1864) 3 Sw. & Tr. 576; 33 L. J. (P. & M.) 73.

(8) (1865) 4 Sw. & Tr. 17; 34 L. J. (P. & M.) 79.

(9) (1866) L. R. 1 P. & M. 101.

(10) (1881) 6 Q. B. D. 300.

(11) (1882) 10 Q. B. D. 295.

[After referring to *Smyth* v. *Wilson* (1) and *Rayson* v. *Parton* (2) he was stopped.]

W. H. Stevenson replied.

BRUCE J. The question raised on the pleadings is whether a person, who has been made a party, as defendant, to an action in the Probate, Divorce and Admiralty Division for establishing a will, is bound by the decision of that Court establishing the will. It is said that the present plaintiff is not so bound because he was not cited to appear in the Probate Court in the character of heir-at-law of Solomon Beardsley, deceased. In my opinion it is immaterial in what character he was cited to appear; if he was a party in the action, he is bound by the proceedings in it. The question decided was the validity of the will; the issue of fact is the same whether the will relates to real or to personal property. I am of opinion that the plaintiff in the present case, having been a party to the action in the Probate Court and having contested the validity of the will, is bound by the decision of that Court. I think that what Sir C. Cresswell said in *Emberley* v. *Trevanion* (3) is good law. He said: "It is plain that the object of the statute was to prevent the trial of the same question twice over; once in a common law court when it affected real property, and a second time in this Court when it also affected personal property. I have always been of opinion that if parties are before the Court in a suit, in whatever capacity, and take part in the litigation, they are bound by the decision in that suit, and that the practice of issuing a separate citation to parties as heirs-at-law, who have already appeared as next of kin, is a work of supererogation." It is true that in the Probate Court the practice has prevailed of issuing citations as heirs-at-law to persons who have already appeared as next of kin, but I think that in no case is it necessary to cite them. I may say that I have had the advantage of consulting Gorell Barnes J., and I have his authority for saying that the practice has been pursued

(1) (1866) 36 L. J. (P. & M.) 82; 15 L. T. 446.

(2) (1869) L. R. 2 P. & M. 38.

(3) 4 Sw. & Tr. 197; 29 L. J. (P. & M.) 142.

1899

BEARDSLEY v. BEARDSLEY.

Bruce J.

ex abundanti cautelâ, and that he fully agrees with the dicta of Sir C. Cresswell in *Emberley* v. *Trevanion*. (1) It is true, also, that s. 63 of 20 & 21 Vict. c. 77, provides that the heir-at-law need not be cited unless it is shewn that the deceased, at the time of his death, was seised of, or had power to appoint by will, some real estate, and that, when not cited, the heir-at-law is not to be affected by the probate; but the important words in the proviso at the end of that section are, "unless such heir has been cited [or made party to the proceedings." Here the plaintiff was made party to the proceedings, and was, therefore, bound by them. Having been a party, and having fought the question of the validity of the will, he cannot now have the whole case tried over again. I am, therefore, of opinion that it is open to the defendant in the present action to raise the defence that the plaintiff is bound by the decision in the Probate Court, and it is not open to the plaintiff to raise again this question, which has already been decided in the Probate Court, of the validity of the will.

RIDLEY J. I am of the same opinion, and do not think that I can usefully add anything to the judgment which my brother Bruce has delivered.

Judgment for the defendant.

Solicitors for plaintiff: *Atkinson & Dresser, for Truman, Nottingham.*

Solicitors for defendant: *Purkis & Co., for Ormond, Chesterfield.*

(1) 4 Sw. & Tr. 197; 29 L. J. (P. & M.) 142.

W. A.

ROBINSON, Appellant; CORPORATION OF SUNDERLAND, Respondents.

1899
Feb. 9.

Justices—Jurisdiction—Order for Entry on Premises—Local Authority—Water-closets—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 36, 305.

Where an application is made under s. 305 of the Public Health Act, 1875, to a court of summary jurisdiction for an order authorizing a local authority to enter upon premises for the purpose of making a sufficient water-closet there in pursuance of the powers given by s. 36, the Court has no jurisdiction to entertain an objection by the owner of the premises that such entry is unnecessary because they are already provided with sufficient sanitary appliances.

Case stated, under the Summary Jurisdiction Acts, by three justices of the borough of Sunderland, sitting as a court of summary jurisdiction.

The appellant, being the owner of a house within the borough of Sunderland, was summoned to appear before the court of summary jurisdiction upon an application by the respondents, who are the urban sanitary authority of the borough, for an order authorizing them to enter, examine, and lay open the appellant's house for the purpose of making plans, surveying, measuring, and executing works—namely, to provide a sufficient water-closet and an ashpit for such house.

The following facts were proved before the court of summary jurisdiction at the hearing of the application: It appeared to the respondents from a report made by the inspector of nuisances for the borough that a house, of which the appellant was owner, was without a sufficient water-closet, earth-closet, and privy, and an ashpit furnished with proper doors and coverings. The respondents duly gave written notice to the appellant, under s. 36 of the Public Health Act, 1875 (1), requiring him, within

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 36: "If a house within the district of the local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time

1899

ROBINSON v. SUNDERLAND CORPORATION.

twenty-eight days from the service of the notice, to provide a sufficient water-closet and an ashpit furnished with proper doors and coverings. That notice not being complied with, the respondents ordered that the works specified in the notice be executed by them. It was necessary for the respondents to enter, examine, and lay open the house for the purpose of making plans, surveying, measuring, and executing the requisite works, and accordingly the borough surveyor, on behalf of the respondents, applied to the appellant for permission to make such entry and examination for such purpose. The appellant having refused permission, notice in writing was duly given to him by the respondents that it was their intention to apply to the court of summary jurisdiction for an order authorizing the respondents to enter, examine, and lay open the house.

At the hearing of the application the appellant's solicitor tendered evidence as to the condition of the house and premises, and as to the sufficiency of a privy and ashpit there. This evidence was objected to by the town clerk on behalf of the respondents.

The justices, being of opinion that they were not entitled to review the decision of local authority as to the sufficiency of the existing privy and ashpit, declined to hear evidence thereon, and made an order, under s. 305 of the Public Health Act, 1875 (1), authorizing the respondents to enter, examine, and lay open the house.

---

therein specified, to provide a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require.

"If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses. . . . ."

(1) 38 & 39 Vict. c. 55, s. 305: "Whenever it becomes necessary for a local authority or any of their officers to enter examine or lay open any lands or premises for the purpose of making plans surveying measuring taking levels making keeping in repair or examining works, ... and the owner or occupier of such lands or premises refuses to permit the same to be entered upon examined or laid open for the purposes aforesaid or any of them, the local authority may, after written notice to such owner or occupier, apply to a court of

The question for the opinion of the Court was, whether the justices were right in refusing to hear the evidence tendered by the appellant as to the sufficiency of the privy and ashpit on the premises in question.

Scott Fox, Q.C. (*A. Adair Roche* with him), for the appellant. The justices ought to have admitted the evidence, and heard the appellant on the question whether the works required to be done by the local authority were necessary, i.e., whether the house was not already sufficiently provided with respect to sanitary matters. The words in s. 305, "if no sufficient cause is shewn against the application," imply that the justices must hear the owner. Here he has not had an opportunity of being heard, and the principle of *Cooper* v. *Wandsworth Board of Works* (1) applies. It is not contended that the notice requiring the appellant to do the work, or the procedure under s. 36, was bad; but when the appellant refused his consent to the entry upon his premises, and the local authority asked for an order enabling them to enter, s. 305 gave the justices jurisdiction to decide whether the entry was necessary, and to hear the cause shewn by the appellant against it. [He also referred to *Diss Urban Sanitary Authority* v. *Aldrich.* (2)]

Tindal Atkinson, Q.C. (*H. Manisty* with him), for the respondents. The justices rightly rejected the evidence tendered for the appellant. Sect. 305 does not give them the jurisdiction contended for. The word "necessary" in that section means "physically necessary." It is a necessity in relation to the purpose for which the local authority desire to enter; in many cases it would not be necessary for them to enter at all. In s. 96, with respect to nuisances, express power is given to the court of summary jurisdiction to make an order for the abatement of the nuisance complained of. There is nothing in s. 305 enabling the Court to make any order that a

---

summary jurisdiction for an order authorizing the local authority to enter examine and lay open the said lands and premises for the purposes aforesaid or any of them.

"If no sufficient cause is shewn against the application the Court may make an order accordingly . . . ."

(1) (1863) 14 C. B. (N.S.) 180.

(2) (1877) 2 Q. B. D. 178.

1899

ROBINSON v. SUNDERLAND CORPORATION.

water-closet is, or is not, necessary; the only jurisdiction is to say whether an entry on the premises is necessary in order to carry out the purpose for which the local authority want to enter. *Cooper* v. *Wandsworth Board of Works* (1) is not an authority in the appellant's favour; rather it shews that the jurisdiction rests entirely with the local authority. The appellant is not left without a remedy. If the notice under s. 36 is bad he can get an injunction, and he may appeal to the Local Government Board under s. 268 against the decision of the local authority that his house is not provided with a sufficient water-closet, &c. Where such an appeal is given that is the only remedy: *Vestry of St. James and St. John, Clerkenwell* v. *Feary*. (2) The discretion as to the sufficiency or insufficiency of the existing system in a house is a discretion vested entirely in the local authority, which they must exercise in each particular case: *Hargreaves* v. *Taylor* (3); *Bogle* v. *Sherborne Local Board* (4); *Wood* v. *Widnes Corporation*. (5) If an opportunity to object is given the objector must take that opportunity when it occurs, or he loses his right: *Attorney-General* v. *Hooper*. (6) Here the appellant should have objected when the notice was given to him. He has had an opportunity of being heard.

Scott Fox, Q.C., replied.

LAWRANCE J. I am of opinion that the justices came to a right conclusion in this case. The difficulty arises in deciding what is the true construction of the words in s. 305, "if no sufficient cause is shewn against the application." It is contended, on the one hand, that those words give the justices jurisdiction to decide whether or not the works, in respect of which it is sought to enter upon premises, are necessary; on the other hand, it is denied that such jurisdiction is given. Sect. 36 gives local authorities jurisdiction to deal with the question of sanitary appliances in houses, and an order may, I think, be asked for under s. 305 in two cases: first, where it is thought that the premises are in an insanitary state, and it is desired to enter and see whether that is so or not; and,

(1) 14 C. B. (N.S.) 180.
(2) (1890) 24 Q. B. D. 703.
(3) (1863) 3 B. & S. 613.
(4) (1880) 46 J. P. 675.
(5) [1898] 1 Q. B. 463.
(6) [1893] 3 Ch. 483.

secondly, where they have been ascertained to be in an insanitary state, and the local authority desire to enter and do what is necessary to put them right. If it appears to the local authority, on the report of their surveyor or inspector of nuisances, that a house is not sufficiently provided with a water-closet, earth-closet, or privy and an ashpit, they may give the owner notice in writing to do what is necessary to provide those things or either of them; and if he does not comply with the notice, they may themselves do the work required to be done; but, the notice having been given, I think it is clear that the justices, on an application for an order under s. 305, cannot entertain the question whether the house is already sufficiently provided. Supposing that the notice given by the local authority was irregular on the face of it, or no report had been made by their surveyor or inspector of nuisances, it may be that those are matters which could fitly be urged before the justices for the purpose of shewing cause against the application for an order to enter. Other matters of a temporary character might also be suggested, as where there was illness in the family living in the house; so that, whilst that state of things continued, it would be dangerous and inconvenient to enter and lay open the premises; but there is no authority for saying that the justices can entertain the question whether the notice given by the local authority under s. 36 is bad because the house is already provided with a sufficient water-closet, &c. The decision of that question rests with the local authority; when they have arrived at the conclusion that the premises are not in a proper condition the justices have no power to interfere with it. In the present case the intention was to raise the very point. Evidence was tendered on behalf of the appellant as to the condition of the house, and the sufficiency of a privy and ashpit there. In my judgment the justices were right in rejecting that evidence; they had no right to receive it on an application under s. 305. As to the alleged hardship on the appellant, s. 268 gives an appeal to the Local Government Board from the decision of the local authority in any case in which they are empowered to recover expenses in a summary manner or as private improvement expenses. When payment

1899

ROBINSON v. SUNDERLAND CORPORATION.

LAWRANCE J.

is sought to be enforced the whole matter can be gone into, and there is ample power for the Local Government Board to give compensation for any loss, damage, or grievance sustained by the person whom the local authority have proceeded against. I think that is the only appeal given. Sect. 305 does not give the appeal contended for by the appellant from the decision of the local authority. I am of opinion that the justices' decision was right.

CHANNELL J. I also think that the justices were right, and that they had no power to enter into the question of the sufficiency or insufficiency of the privy and ashpit on the premises in question. We have to consider what is the true construction of s. 305. It is a section passed in order to provide machinery for enabling local authorities to enter upon premises for certain purposes; they cannot enter without the sanction of an order of the justices. [The learned judge read s. 305.]

In this particular case the words of the section, which describe the purpose for which an order to enter was asked, are "for the purpose of making works"; but various other purposes are specified, and I think that the words "for the purpose of doing works which they have statutory authority to do" may be read into the section. That, however, is the most you can read into the section in the appellant's favour. The result is that the justices, having to inquire whether preliminary matters have been complied with, may inquire into the necessity for an order for entry, and into the purposes for which it is sought to enter in order to see whether that purpose is a purpose in respect of works which the local authority have statutory authority to do. Then, "if no sufficient cause is shewn against the application," the court of summary jurisdiction may make an order for entry. The justices must see what the local authority want to go in for, and in a proper case make the order. Here the local authority want to go in for the purpose of making a sufficient water-closet and an ashpit. The power to do the work depends upon s. 36, which is: [The learned judge read s. 36.]

The words "appear to such authority" are obviously put in for the purpose of making the local authority the judges on the question whether the house is without a sufficient water-closet, &c. It depends upon the opinion of the local authority, not upon the fact of sufficiency or insufficiency. It cannot possibly be a matter for the justices to decide; they can only inquire in this respect whether, in the opinion of the local authority, there is a sufficient water-closet, &c. They may also inquire, I think, whether the local authority have taken the proper procedure—whether they have done everything which is made by the statute a condition precedent to the right to enter. I am inclined to think—but it is not necessary to decide the point—that if the local authority gave notice to the owner to provide a sufficient water-closet without having had a report from their surveyor or inspector of nuisances, that might be sufficient cause shewn against an application made under s. 305. In *Lewis* v. *Weston-super-Mare Local Board* (1) Stirling J. held that the surveyor must be the real surveyor of the local authority; a mere locum tenens would not do. Probably that is a matter which the justices might inquire into. Again, if there can be gathered from the statute an implied obligation on the part of the local authority to hear the owner before requiring him to provide a sufficient water-closet, &c., equally the justices might inquire into that—not to hear the owner upon the question of sufficiency or insufficiency, but to hear him upon whether the notice requiring him to do the work was not bad by reason of the local authority not having complied with the conditions precedent of the statute. No such point was raised before the justices in this case. In my opinion the principle of *Cooper* v. *Wandsworth Board of Works* (2) does not apply here at all. The Wandsworth Board of Works pulled down a house, which they had no right to do unless the builder had failed to give a certain notice. He said that he had given the notice, and that it must have miscarried. His house was being pulled down without his having had the opportunity of being heard to say that he had sent the notice. The Court thought that was contrary to natural justice, but

(1) (1888) 40 Ch. D. 55. (2) 14 C. B. (N.S.) 180.

1899

ROBINSON v. SUNDERLAND CORPORATION.

Channell J.

they did not say that any formal hearing was necessary. The owner there did not know what was alleged against him, and he was entitled to know it and to have the opportunity of answering it. In the present case the procedure was totally different. Under s. 36 the local authority must first have the report of their surveyor or inspector of nuisances. It is highly improbable that he would make his report without going to the premises. The next step is that the owner has notice under s. 36. He knows what is going on, and the case of *Attorney-General* v. *Hooper* (1) shews that as soon as he knows what is going on then is his time to object. When the application under s. 305 was heard before the justices, it was not enough for him to say that he thought his house was provided with a sufficient privy and ashpit, nor to call experts to prove that it was, because the governing thing in s. 36 is that the local authority should think his privy and ashpit insufficient. That being the only point he wished to raise, no formal hearing was necessary. I am of opinion that *Cooper* v. *Wandsworth Board of Works* (2) has no application to this case. The same point is not raised here, the only point raised being whether the justices had power to consider the question as to the sufficiency or insufficiency of the appellant's privy and ashpit. I am clearly of opinion that they had not. That matter was one entirely for the local authority to decide subject to an appeal to the Local Government Board.

Judgment for the respondents.
Leave to appeal.

Solicitors for appellant: *Maples, Teesdale & Co., for C. T. Stockdale, Sunderland.*

Solicitors for respondents: *Johnson, Weatherall & Sturt, for F. M. Bowey, Sunderland.*

(1) [1893] 3 Ch. 483.

(2) 14 C. B. (N.S.) 180.

W. A.

THE LANCASHIRE ASYLUMS BOARD *v.* THE LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER.

1899
Jan. 27, 28;
Feb. 18.

Local Government—Rates—County—County Boroughs—Contribution for Special Purpose—County Rate Basis—Apportionment—Local Act—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 33—*Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 2, 3, 9—*Agricultural Rates Act*, 1896, *Orders*, *Art.* XVII.

By a local Act, passed in 1891, the lunatic asylums board of a county containing county boroughs were directed to raise in every year by contributions from the county and the county boroughs part of the expenses incurred by the board in the execution of their duties, and to divide the estimated amount to be raised for each year between the county and the county boroughs in proportion to their respective rateable values as ascertained under s. 33 of the Local Government Act, 1888:—

Held, that, since the Agricultural Rates Act, 1896, came into force, the board ought to divide such estimated amount between the county and the county boroughs in proportion to their respective assessable values as ascertained under that Act and the regulations of the Local Government Board made in pursuance of it, instead of in proportion to their respective rateable values as ascertained under the Local Government Act, 1888.

SPECIAL CASE stated in an action.

1. The Lancashire Asylums Board is constituted pursuant to the Lancashire County (Lunatic Asylums and other Powers) Act, 1891 (54 Vict. c. xx.) (Local), and is the lunatic asylums board for the administrative county of Lancaster and for fifteen county boroughs named in the 1st schedule of that Act.

2. The city of Manchester is one of such fifteen county boroughs, and the defendants, hereinafter called "the corporation," are the council of the city.

3. Under s. 23 of the local Act all expenses incurred by the asylums board in the execution of their duties shall be paid out of a fund to be called "The Asylums Fund," and any deficiency in that fund is to be raised by contributions to be made by the administrative county and by each of the county boroughs in accordance with the provisions of that Act.

4. Sect. 24 of the local Act enacts: "The board shall before the first day of March in every year estimate the total amount

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

required to be raised by contributions for the ensuing year, and shall divide that amount between the county and the county boroughs in proportion to the respective rateable values (as ascertained under s. 33 of the Local Government Act, 1888) of the county and the county boroughs, and shall add to the amount apportioned to the county boroughs the sum of 4000*l.*, or such other sum as may from time to time be fixed by agreement or by arbitration in manner provided by this Act (in this Act referred to as 'the added sum').

"The amount so apportioned, together with the added sum, shall be the aggregate amount required to be contributed by the county boroughs, and shall be contributed by them respectively in proportion to their respective rateable values ascertained as aforesaid. The balance of the amount required to be raised by the board shall be contributed by the county council."

5. Sect. 26 of the local Act enacts: "For the purpose of obtaining payment of the sums to be contributed by the county and county boroughs respectively the chairman of the board shall before the first day of March in every year send to the county council, and to the council of each county borough, a precept for the payment of the amount to be contributed by the county or county borough as the case may be. . . . . If the precept of the board is not complied with, the board may recover the sums due by action or other proceeding in any court of competent jurisdiction against the authority in default."

6. Sect. 33, sub-s. 2, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), enacts: "Where for the purpose of calculating any contribution or payment to be made under this Act it is necessary to ascertain the rateable value of both a county and a county borough, such rateable value shall be ascertained and fixed by a joint committee composed of representatives of all the councils concerned, and such committee shall for that purpose have all the powers and jurisdiction of quarter sessions and of a committee of justices appointed under the County Rate Act, 1852, and the Acts amending the same. . . . ."

7. Up to the coming into operation of the Agricultural Rates

Act, 1896 (59 & 60 Vict. c. 16), the amounts required to be contributed in all precepts sent to the county council and to the council of each county borough, under s. 26 of the local Act, were calculated upon the respective rateable values of the county and the county boroughs ascertained and fixed in the manner prescribed by s. 33, sub-s. 2, of the Local Government Act, 1888, and according to the provisions of s. 24 of the local Act.

8. Sect. 1 of the Agricultural Rates Act, 1896, enacts that during the continuance of that Act the occupier of agricultural land in England shall be liable, in the case of every rate to which the Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments. The contributions of the county and county boroughs respectively are payable out of the county fund and borough fund respectively; and, in so far as they are payable out of rates, are payable out of the county rate and borough rate respectively, and the Agricultural Rates Act, 1896, applies to these rates.

9. In order to make up the deficiency, due to the provisions of s. 1 of the Agricultural Rates Act, 1896, in the amount which is raised by the authorities enumerated in the schedule to that Act, an annual grant is made, under s. 2, from the local taxation account to each of such authorities, in the Act called "spending authorities." (1)

10. In calculating the amount of the annual grant to be made under the Agricultural Rates Act, 1896, to the county council, and to the councils of each of the county boroughs, who are respectively "spending authorities" within that Act, the deficiencies which would arise, owing to the provisions of s. 1, in the amount recoverable by each of such spending authorities by means of rates levied to meet precepts of the asylums board were ascertained in the manner prescribed

(1) By s. 9 of the Agricultural Rates Act, 1896, "the expression 'spending authority' means any of the local authorities in England mentioned in the schedule to this Act."

Schedule: "County councils, councils of county boroughs, councils of boroughs and other urban districts and of rural districts, boards of guardians, the receiver of the metropolitan police district, school boards, highway boards, surveyors of highways."

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

by that Act and the rules made by the Local Government Board thereunder, and the amounts of such deficiencies were included in calculating such annual grants, and the corporation receives, and will receive annually, during the continuance of the Agricultural Rates Act, 1896, a grant from the local taxation account in respect of the deficiency in the amount levied by rates in respect of the precepts of the asylums board.

11. Upon the Agricultural Rates Act, 1896, coming into operation, a joint committee of the county of Lancaster, formed as required by s. 33, sub-s. 2, of the Local Government Act, 1888, prepared a basis or standard for county rates in accordance with Art. XVII. and Sched. Z of the Agricultural Rates Order, 1896 (1), which basis or standard was as follows:—

(1) Agricultural Rates Act, 1896 (Orders), Art. XVII.: "1. County councils and other councils whose duty it is to make, for the purposes of any rate to which the Act applies, a basis or standard or valuation which will not contain particulars of separately rated hereditaments, but only the total rateable value of each parish, shall cause a basis or standard or valuation to be prepared in the form set out in Sched. Z hereto, shewing (1.) the total rateable value of each parish in the county or other area to which the basis or standard or valuation applies according to the basis, standard, or valuation then in force, (2.) the total rateable value of a parish (according to such basis, standard, or valuation) divided, if the parish contains any agricultural land, between (*a*) agricultural land, and (*b*) buildings and other hereditaments not being agricultural land, according to the proportion in which the total rateable value of the parish is so divided in the return made by the assessment committee as required in Art. x. 3 . . . . or by overseers as required by Art. XI., and (3.) the assessable value of each parish, that is to say, one-half the rateable value of the agricultural land in the parish, if the parish contains any agricultural land, added to the rateable value of the buildings and other hereditaments not being agricultural land, in the parish.

"2. Such basis, standard, or valuation shall, on or before the 10th day of February, 1897, be approved by the council, or by some committee authorized by the council to approve the same; and, notwithstanding anything contained in the County Rates Act, 1852, or in any other Act, from and after the 31st day of March, 1897, the values of the several parishes as shewn in the column of such basis, standard, or valuation headed 'Assessable Value of the Parish, being one-half the amount in column 3 added to the amount in column 4' shall during the continuance of the Act be the basis, standard, or valuation for the levying of county rate or any other rate leviable by the council according to the assessable value of the several parishes on which the same is levied, unless or until the council shall make a new basis, standard, or valuation in manner provided by law."

"Agricultural Rates Act, 1896.

"The Temporary Basis or Standard for County Rates.

Name of Township.	Net annual value of each Township according to the basis, standard, or valuation in force at the passing of the Act.	Net annual value of each Township as shewn in column 2 divided between agricultural land and buildings and other hereditaments not being agricultural land in the proportion in which the rateable value of the township is so divided in the return made by the Assessment Committee.		Assessable value of the Township being one-half the amount in column 3 added to the amount in column 4.
		Net annual value of agricultural land in the Township.	Net value of the buildings and other hereditaments not being agricultural land in the Township.	
1.	2.	3.	4.	5.

The net annual values set forth in the second column were the net annual values ascertained by a joint committee under s. 33 of the Local Government Act, 1888, and were included in the basis or standard for county rates allowed and confirmed by the county council on August 4, 1892, which basis or standard was in force at the passing of the Agricultural Rates Act, 1896.

12. The amounts required by the precepts sent by the asylums board to the county council and to the councils of each of the county boroughs have, since the Agricultural Rates Act, 1896, came into operation, been calculated upon the values ascertained in the manner described in the last column of the "Temporary Basis or Standard for County Rates," and, with the exception of the amount required by the precepts hereinafter mentioned, have been duly paid to the treasurer of the asylums board.

13. Before March 1, 1897, the asylums board estimated the total amount to be raised by contributions for the then ensuing year, and divided that amount between the county council and

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

the county boroughs in proportion to the respective values thereof ascertained in the manner described in the last column of the Temporary Basis or Standard, and with the addition required by s. 24 of the local Act. The portion of the amount to be contributed by the corporation was directed to be raised by two half-yearly instalments.

14, 15, and 16. The first instalment was paid by the council of the city of Manchester, without prejudice to the questions raised in this special case. On the chairman of the asylums board sending a precept for the payment of the second instalment, the council of the city of Manchester paid to the treasurer of the asylums board the amount which, added to the amount of the first instalment, the council would have had to pay towards the total amount estimated by the asylums board as necessary to be raised by contributions for the year, if such total amount had been divided between the county council and the county boroughs in proportion to the respective rateable values thereof ascertained and fixed in the manner stated in paragraph 7 of this case, and set forth in column 2 of the Temporary Basis or Standard for County Rates referred to in paragraph 11.

This action was brought by the asylums board to recover the balance—357*l.* 9*s.* 5*d.*—alleged to be due upon the precept for the second instalment.

The questions for the opinion of the Court are: Whether the asylums board, in dividing the total amount required by it to be raised by contributions for any year during the continuance of the Agricultural Rates Act, 1896, is—

(1.) To divide that amount between the county and the county boroughs in proportion to their respective assessable values ascertained in the manner specified in the last column of the Temporary Basis or Standard for County Rates referred to in paragraph 11 of the case; or,

(2.) To divide that amount between the county and the county boroughs in proportion to the respective rateable values of the county and the county boroughs ascertained in the manner described in paragraph 7 of the case, and set forth in column 2 of such temporary basis or standard.

Cripps, Q.C. (*R. Cunningham Glen* with him), for the plaintiffs. The asylums board are right in dividing the amount required by them to be raised by contributions for the ensuing year in proportion to the assessable values of the county and county boroughs as ascertained under the Agricultural Rates Act, 1896, and the regulations. Sect. 24 of the Local Act of 1891 must be read subject to the provisions of the Act of 1896. The respective values of the county and the county boroughs must be ascertained as provided by that Act, the effect of which is to make, during its continuance, the county rate basis for all purposes the assessable values, ascertained as described in the form given by Sched. Z of the regulations, instead of the rateable values ascertained under s. 33, sub-s. 2, of the Local Government Act, 1888. This is shewn by Art. XVII. (2) of the Regulations made under the Agricultural Rates Act, 1896, which provides that notwithstanding anything contained in any other Act the assessable value shewn in column 5 of the form shall be the basis, standard, or valuation for the levying of county rate or any other rate leviable by the council. It is true that the asylums board are not a "spending authority" within the meaning of the Agricultural Rates Act, nor can they levy rates; but by s. 9 "rate" includes "any sum which, though obtained in the first instance by a precept . . . requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined." The sum required by the precept of the asylums board is such a sum. Here the joint committee have fixed the assessable value, which thenceforth takes the place of the rateable value as ascertained under s. 33 of the Local Government Act, 1888.

Macmorran, Q.C. (*Walter C. Ryde* with him), for the corporation of Manchester. The object of the Agricultural Rates Act was to give relief to individual occupiers of agricultural land, whether in the county or in the county boroughs. If the view taken by the asylums board be correct, the relief will be given twice over—once in making the apportionment and again in levying the rate—and a serious burden will be thrown upon the county boroughs in which there is very little agricultural land. The asylums board are not a "spending authority"

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

to which s. 3 of the Act applies. (1) That section is the governing section in respect of sums to be raised by rate from two or more parishes; the Act, therefore, has no application to the asylums board. Nor are the board an authority which can levy rates. The regulations (Art. XVII.) which provide for the new county rate basis only provide that it is to be the basis for the levying of the rate. The board must take the basis fixed for them by the joint committee under the Local Government Act, 1888, namely, the rateable values of the county and the county boroughs respectively. The rates made on assessable values ascertained as shewn in Sched. Z are rates leviable by spending authorities. The precept issued by the asylums board, and the division of the money in pursuance of that precept, are not within the language of s. 9 of the Act of 1896.

Cripps, Q.C., replied.

Cur. adv. vult.

1899. Feb. 18. The following written judgment of the Court (Bruce and Ridley JJ.) was delivered by

RIDLEY J. The question raised by this case is whether, during the continuance of the Agricultural Rates Act, 1896, the Lancashire Asylums Board ought to divide the amount yearly required to be raised for their purposes in proportion to the rateable value of the county and the county boroughs, as ascertained by the Local Government Act, 1888, s. 33, or in proportion to the assessable value of the same as ascertained by the Agricultural Rates Act, 1896, and the Regulations of the Local Government Board issued under that Act.

(1) The Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16).

Sect. 3: "(1.) Where any spending authority require in any half-year or other period to raise from two or more parishes a sum by a rate to which this Act applies, they shall, in determining the net amount to be so raised, deduct the sum issuable to them in respect of the said rate on account of their share of the annual grant for the said half-year or other period, and the net amount after that deduction shall, where it would otherwise be raised in proportion to the rateable value, be raised in proportion to the assessable value of those parishes.

"(2.) For the purpose of this section the assessable value of a parish shall be the rateable value thereof reduced by an amount equal to one-half of the rateable value of the agricultural land in the parish."

By the Lancashire County (Lunatic Asylums and other Powers) Act, 1891 (54 Vict. c. xx.) (Local), a board was constituted, called "The Lancashire Asylums Board," to which were transferred the lunatic asylums of that county, and it was provided that all expenses incurred by them in the execution of their duties should be paid out of a fund to be called "The Asylums Fund." Sect. 24 deals with the raising of this fund, and is as follows: [The learned judge read s. 24 of the Local Act, as set forth in paragraph 4 of the special case.] By s. 33, sub-s. 2, of the Local Government Act, 1888, it is enacted: [The learned judge read s. 33, sub-s. 2.] Under these powers, from 1891 to the passing of the Agricultural Rates Act, 1896, the amounts required to be contributed were calculated upon the respective values of the county and county boroughs as ascertained by this section, and the Lancashire Asylums Board, under s. 26 of their Act, sent precepts to the county council and the borough councils for payment of the amount to be raised by each of them respectively. It was not their duty to find the rateable values, but to take them as found by the authorities, and to divide the total amount required in accordance with those values. But by the passing of the Agricultural Rates Act, 1896, a different set of circumstances was constituted, out of which has arisen the question now for decision. For the asylums board it is argued that it is now their duty to take as the basis of the division to be made by them the "assessable values" of the counties and county boroughs, as specified by the Agricultural Rates Act, 1896, in place of the "rateable values" as calculated under the Local Government Act, 1888. For the city of Manchester, on the other hand, it is contended that the "assessable values" have no operation except for the levying of rates, and that, as the asylums board is not an authority levying rates, they ought to base their calculations on the "rateable values," found as they were before the passing of the Agricultural Rates Act, 1896, which, as they contend, operates upon the amount so apportioned to each council after it is so apportioned and not before. The difference brought about is considerable in effect; for, if the contention of the asylums board is right, the amount found as due from the

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

Ridley J.

borough councils must be largely increased in comparison with that left to be raised by the county; whilst, on the other hand, the county boroughs, which for the most part contain little agricultural land, will receive but a small annual grant from the Local Government Board. Since the Act of 1896 came into operation the county rate basis has been altered accordingly by the authorities, and the asylums board have in fact made their calculations upon this new basis, instead of on the "rateable values" as they were ascertained before that Act.

We proceed to examine the provisions of the Agricultural Rates Act, 1896, upon the effect of which the decision of this case depends.

By s. 1, the occupier of agricultural land in England is to be liable to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments, and this applies to all rates, with some exceptions not material to this case.

By s. 2, in respect of the deficiency which will arise in the produce of rates made by the "spending authorities," there is to be paid by the Commissioners of Inland Revenue to the "Local Taxation Account" an annual sum, and this sum is to be issued from such account in half-yearly payments of the amount certified under the provisions of the Act to each spending authority. The spending authorities are defined in the schedule to the Act to be divers bodies, such as county councils, councils of boroughs, and boards of guardians; but the term does not include the Lancashire Asylums Board.

By s. 3, any spending authority requiring to raise from two or more parishes a sum by rate is, in determining the amount to be raised, to deduct the sum issuable to them in respect of the rate on account of their share of the annual grant provided for in s. 2 for the period of the rate, and to raise the net amount, after making such deduction, in proportion to the assessable value of those parishes. And such assessable value is to be the rateable value of each of the parishes, reduced by an amount equal to one-half of the rateable value of the agricultural land in the parish.

It seems perfectly plain that the effect of this is to give the relief intended by the Act to be given to agricultural land by

assessing it at half its value, instead of assessing it at the full value and allowing the ratepayer to pay his rate at half the rate in the pound at which the rate is made. The same result is arrived at by one method as by the other.

Sect. 4 deals with the amount of the annual grant issuable as stated above, and it is not necessary to state the provisions relating to this, except that it is, by the effect of this section and s. 6, to be ascertained by returns made to the Local Government Board by the spending authorities of the sums received by them in the year next before the passing of the Act.

Sect. 5 deals with the preparation of valuation lists and the basis or standard for any county rate, and with valuations made by borough councils for raising the borough or other rate; and it provides that, where separate hereditaments are specified therein, the value of agricultural land is to be stated separately from that of any other hereditament, and that in every case the total rateable value of the agricultural land in each case shall be stated separately from the total rateable value of the other hereditaments in each parish.

It appears to us that this provision was necessary in order properly to carry out the enactments contained in s. 3, for it would not be possible to get at the "assessable value" of a parish or a hereditament under the Act unless the value of the agricultural land contained in it either were separately set out in the valuation list or in the county rate basis, as the case might be—that is to say, the portion of the whole value which is to be taken at half its value must be ascertained before it can be so treated, and therefore by this section it is provided that the valuation list, or the county rate basis, is in future to contain separately the value of the agricultural land (if any) included in each hereditament or parish.

By s. 6, sub-s. 3, the Local Government Board has power to make regulations for carrying out the Act, to which regulations allusion must be made; but it is desirable first to refer to the definition of "rates" contained in s. 9 of the Act; and this is, "a rate made during the continuance of this Act, the proceeds of which are applicable to public local purposes, and

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

Ridley J.

which is leviable on the basis of an assessment in respect of the yearly value of property, and includes any sum which, though obtained in the first instance by a precept, certificate, or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined."

Regulations were issued by the Local Government Board under the Act providing for the returns required and various other matters of detail not material to this case. It is then ordered, by way of carrying into effect the provision contained in s. 5 of the Act, that the valuation list is to be made in a particular form, shewn in the schedule, with a separate column shewing the rateable value of the agricultural land (if any) contained in any hereditament, and that the lists are to be in this form, instead of in the form provided by the Union Assessment Committee Act, 1862, for every rate to be made hereafter.

Finally, as to the county rate, it is ordered (Art. XVII.) that county councils and other councils whose duty it is to make, for the purposes of any rate, a basis or standard of valuation which will not contain particulars of separately rated hereditaments, but only the total rateable value of each parish, shall cause a basis, or standard, or valuation to be prepared in the form set out in Sched. Z, which is as follows: [The learned judge read the form.]

It is further ordered that, notwithstanding anything contained in the County Rates Act, 1852, or in any other Act, from March 31, 1897, the values of the several parishes as shewn in the column of such basis, standard, or column headed "Assessable value," &c. (that is to say, column 5 in the above schedule), shall, during the continuance of the Act, be the basis, standard, or valuation for the levying of the county rate, or any other rate leviable by the council, according to the assessable value of the several parishes on which the same is levied, unless or until the council shall make a new basis, standard, or valuation in manner provided by law.

It seems perfectly clear that this statute, and the regulations carrying it out, were intended to be comprehensive during the

period of its continuance in operation. The new valuation list and the new county rate basis are to take the place of the former ones in all respects. The Union Assessment Committee Act, 1862, the County Rates Act, 1852, and the Local Government Act, 1888, so far as they conflict with the new statute, are superseded, and it is equally clear that the rate in question is a rate within the scope of the statute.

But it was argued, as has been said, that although this is perfectly true, the duty of the Lancashire Asylums Board still is, as it was, to divide the sum they require in proportion to the rateable value of the boroughs and county, and not according to their assessable value; that s. 3 of the Agricultural Rates Act is the leading section of that Act, and defines its scope, and that, as the Lancashire Asylums Board is not a spending authority, it has no application to them; further, that the regulations which provide for the new county rate basis say that it is to be the basis for the levying of the rate; and that the Lancashire Asylums Board is not a levying authority, but performs a duty previous to, and quite distinct from, the levying of the rate, and that, if this were held otherwise, the Act would apply twice over in relief of the agricultural ratepayer. We do not think, however, that this argument is well founded. It is not correct to say that s. 3 is the leading section of the Act, or defines its application; rather it prescribes the method by which the relief granted to the agricultural ratepayer is to be carried out. That relief is to be in respect of all rates, but by this action of the "spending authorities" it is to be obtained, not by payment of half the rate, but by payment of the rate on half the value; and when the provisions of s. 5 and of the Local Government Board regulations are considered, it becomes clear, first, that in all valuation lists the value of the agricultural land is to be separately stated; and, secondly, that in the county rate basis that separate value and the assessable value of the parish are to be stated, not as enacting the object of the Act, but as providing the method of carrying out that object. Reliance was placed on Art. XVII. (2) of the regulations because of the words which it contains, "for the levying of county rate or any other rate leviable by the council," and so

1899

LANCASHIRE ASYLUMS BOARD v. MANCHESTER CORPORATION.

Ridley J.

forth; but we do not think that to those words can be given the effect of limiting the application of the Act. To begin with, the regulations are "generally for carrying into effect this Act" (s. 6, sub-s. 3, of the Act); and, further, the words are contained in the same article which prescribes this assessable value or new basis to be the law notwithstanding anything contained in any other Act. This is tantamount to saying that the new basis or assessable value is to be read into s. 24 of the Lancashire Asylums Board Act of 1891, and we cannot place any more limited construction on the words without some precise indication in the Act of 1896, or the regulations, that this ought to be done. It is true that the precise position and duties of the Lancashire Asylums Board are not dealt with by the Agricultural Rates Act, 1896; but we cannot, therefore, exclude it from an Act of so general an intention. No doubt the construction so placed on the Act is favourable to agricultural land (whether it amounts to applying the Act twice is a question of words); but we find in that circumstance no reason why it should not have its plain meaning. We, therefore, answer question one in the affirmative, and question two in the negative.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Ridsdale & Son, for F. C. Hulton, Preston.*

Solicitors for defendants: *Austin & Austin, for W. H. Talbot, Manchester.*

W. A.

[IN THE COURT OF APPEAL.]

C. A. 1899 *March* 4.

McNICHOLAS *v.* DAWSON & SON.

Employer and Workman—Accident to Workman—Compensation—Employment in, on, or about a Factory—Machinery to which any provision of the Factory Acts applies—Dangerous Machinery in a Factory—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *ss.* 4, 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

By s. 4 of the Factory and Workshop Act, 1895, power is given to a court of summary jurisdiction to make an order as to a dangerous machine used in a factory or workshop.

By s. 23, sub-s. 1 (v.) (*b*), of the same Act this provision, among others, "shall have effect as if any premises on which machinery worked by steam . . . . is temporarily used for the purpose of the construction of a building . . . . were included in the word factory."

By s. 7 of the Workmen's Compensation Act, 1897, "factory includes any . . . . machinery . . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895."

A workman was employed in a shed to look after a steam-engine connected with a mortar pan for mixing mortar for use on a building near at hand. While so employed he sustained personal injuries through an accident. On a claim under the Workmen's Compensation Act, 1897:—

Held, that, as the engine was being temporarily used for the purpose of the construction of a building, the provisions mentioned in s. 23 of the Factory and Workship Act, 1895, had effect as if the shed were a factory; so that a provision of the Act, namely s. 4 relating to the power to make an order as to a dangerous machine used in a factory, applied to the engine, which therefore came within the definition of a factory in s. 7 of the Workmen's Compensation Act, 1897, and compensation could be claimed under that section.

APPEAL from the decision of a county court judge upon a question of law arising upon a claim for compensation under the Workmen's Compensation Act, 1897.

The appellant was the personal representative of a workman who, while in the employment of the respondents, met with an accident which caused his death. The respondents were builders, and were engaged in erecting a post-office. They had, about twenty yards from the building which was being erected, a steam-engine in a shed. The engine was connected with a mortar pan, standing outside the shed, in which mortar was

C. A. 1899

McNICHOLAS v. DAWSON & SON.

mixed for the purposes of the building. Across the middle of the shed there was a revolving shaft worked by the engine, and about four feet from the ground. There was a full-sized door to the shed at the side furthest away from the mortar pan and a small door opposite. This small door opened from the inside and was sometimes used for ventilation. The duty of the deceased was to look after the engine, to fire and start the engine, to oil it, and, when not employed about the engine, to look after, oil, and feed the mortar pan. On the morning of the accident the deceased was in the shed, and called to a man, who was employed at the mortar pan outside the shed, asking him if he was ready. The answer was in the affirmative, and the deceased then started the engine. Two minutes afterwards the man outside heard a noise in the shed, and going there found the deceased going round with the shaft. He stopped the engine, but the deceased died shortly afterwards from the injuries he had sustained. No one saw how the accident happened. It was the duty of the deceased, after he had started the engine, to go to the mortar pan, the proper way to go being by the main door. To go to the small door it would be necessary to creep under the revolving shaft, and the deceased had been forbidden to go out of the shed by this small door. The oil-can used for oiling the engine was found on a shelf where it was kept when not in use, shewing that the accident did not happen while the deceased was oiling the engine. The county court judge held that the engine-shed and the engine-room were a factory within the meaning of s. 7 of the Workmen's Compensation Act, 1897, and that the deceased had not been guilty of serious and wilful misconduct within s. 1, sub-s. 2 (*c*), of the Act, so as to bar the claim for compensation; but that, though the accident probably arose in the course of the employment of the deceased, it was left absolutely uncertain whether it arose "out of" the employment; and as the burden of proof as to this was on the applicant, he gave judgment for the employers.

The applicant appealed.

Macaskie and *E. W. Perkins*, for the appellant. Assuming that the burden of shewing that the accident arose out of the

employment of the deceased was on the applicant, he cannot be called on to negative all the probabilities which may be suggested against the view that it did so arise. Here the workman was killed in the place where he had to work, during working hours, and while he was actually at work. The deceased might have been going to open the small door for ventilation, or he might have intended to go the shortest, although prohibited, way to the mortar pan; in either case the accident arose out of and in the course of his employment.

[They cited *Smith* v. *Lancashire and Yorkshire Railway* (1); *Lowe* v. *Pearson*. (2)]

Ruegg, Q.C., and *A. Powell*, for the respondents. The onus thrown on the appellant has not been satisfied, because the cause of the accident is left in doubt. The ordinary course of duty of the deceased would not have taken him near the shaft. He might have gone near it for some object of his own, or to go out of the small door, which had been forbidden; in either case it cannot be said that the accident arose out of and in the course of his employment.

The Act does not apply, because the deceased was not employed in a factory within the meaning of s. 7. It was admitted that the shed was not a factory within the Factory and Workshop Acts, 1878 to 1891. There was no building on which machinery was being used for the construction, repair, or demolition of the building; so that the case does not come within the first part of s. 7. Neither the shed nor the machinery comes within the definition "machinery or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." These words refer to s. 23, sub-s. 1, of the last-mentioned Act. Clause (*a*) is confined to machinery and plant used for the purpose of loading or unloading at a dock, wharf, quay, and warehouse. The case does not come within clause (*b*), because the machinery was not being used for the purpose of the construction of a building, but for the purpose of making mortar, which the builder might, if he thought fit, use on the adjacent building. The mortar might have been made at a distance and brought to the place, and

(1) Ante, p. 141. (2) Ante, p. 261.

C. A. 1899

McNICHOLAS v. DAWSON & SON.

the fact that it was made on the spot does not make any difference, for the clause—(*b*)—is directed to actual mechanical work on a building. The shed, therefore, was not premises described in that clause, and was, therefore, not a factory. The power given by s. 4 of the same Act to make orders as to dangerous machines applies only to a machine used in a factory and workshop, and consequently no "provision of this Act with respect to the power to make orders as to dangerous machines" (s. 23, sub-s. 1 (v.)) could have effect with regard to the engine, and it was not a factory within the definition in the Workmen's Compensation Act, 1897.

[They cited *Mellor* v. *Tomkinson*. (1)]

A. L. SMITH L.J. The question before us is whether this case has been brought within the purview of the Workmen's Compensation Act, 1897.

The occupation of the deceased was to look after an engine in a shed, and when not so employed to see to the grinding of mortar which was being used in the erection of a post-office near at hand. Early in the morning he went to his work and started the engine, and two minutes after he had done so he was found crushed to death.

On the part of the employers it is said that no evidence was given to shew that death was caused by an accident occurring to the man which arose out of and in the course of his employment. It is said that it is perfectly consistent with the fact of his death that he may have been going out of the small door of the shed, and that, as he had been told not to do so, the accident did not arise out of and in the course of his employment. If that view is to obtain, it would come to this—that if a workman goes a wrong way from one point where he is employed to another where he is employed he is, while doing so, not acting in the course of his employment. The county court judge hampered himself with the case of *Smith* v. *Lancashire and Yorkshire Railway* (2), decided in this Court a short time ago. But there it was found as a fact by the learned county court judge that the deceased got upon the footboard of a train, after

(1) Ante, p. 374. (2) Ante, p. 141.

it had started, not for any object of his employment, but for his own pleasure. We had to deal with that finding, and in the face of it we were constrained to hold that the accident was not one arising out of his employment. I do not see how that decision, which was upon this special finding, can cover the present case.

Assume that the deceased was going out of the shed the wrong way, and did so carelessly, rashly, and negligently, that would not absolve the master under the Workmen's Compensation Act unless the injury to the deceased is attributable to serious and wilful misconduct on his part, and this the learned county court judge has negatived. It seems to me that the accident to the deceased arose out of and in the course of his employment; and on this point I disagree with the learned judge.

Another point was raised, and on this I agree with the conclusion arrived at by the learned judge. It was argued that the employment on which the deceased was engaged did not come within s. 7 of the Workmen's Compensation Act, 1897. Sub-s. 2 of that section defines the word "factory," and includes, taking the words that are pertinent to this case, "any machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." Turning to that Act, we find that in s. 23 certain provisions, one of which is, "(v.) The provisions of this Act with respect to the power to make orders as to dangerous machines" shall have effect as if (again reading only the words pertinent to this case) "(*b*) any premises on which machinery worked by steam is temporarily used for the purpose of the construction of a building or any structural work in connection with a building" were included in the word "factory." Thus what the Legislature has done is to apply the provisions of that Act with respect to the power to make orders as to dangerous machines to premises on which there is machinery worked by steam, as in this case, temporarily used for the construction of a building. If complaint had been made by an inspector, and the power of a court of summary jurisdiction had been invoked, I am of opinion that s. 4 of the Act would have applied, on the ground that the

C. A. 1899

McNicholas v. Dawson & Son.

A. L. Smith L.J.

machinery in the shed was being temporarily used for grinding mortar for the purpose of the construction of a building, and thus was being used in a factory within the express words of s. 23 (*b*). I think, therefore, on this point the county court judge was right in holding that this case came within the Act of 1897; but as I disagree with him on the other point, the appeal must be allowed.

Collins L.J. I am of the same opinion. No one saw what happened to the deceased, but there was evidence that he was in the employment of the respondents, that it was his duty to fire and start the engine, possibly to open the small door for the purposes of ventilation, and to pass out from the shed to the mortar pan. The evidence was that on the morning in question he started the engine, and two minutes after he was found involved in the machinery. The question is whether these facts amount to evidence that the personal injury to the deceased was caused by accident arising out of and in the course of his employment. I agree with counsel for the respondents that the onus of proving that state of things lies on the applicant. It comes to this: Was there evidence fit to be submitted to a jury that the accident arose out of and in the course of the employment?—because the county court judge did not decide on the evidence, but, in effect, took the view that there was no evidence fit to be submitted to a jury. It seems to me that there was such evidence. The highest that can be put against the deceased is that he was going out of the shed by a dangerous way, and met with his death while trying to get under the shaft of the engine. It was as much his duty to get out of the shed as it was to go into it, and both would be done in the course of his employment. Under the Workmen's Compensation Act, 1897, it is not necessary to prove negligence on the part of the employer, and it is no defect in the workman's case that he has been guilty of contributory negligence. If he brings himself within the Act by shewing that the accident arose out of and in the course of his employment, his case can only be met by the employer by shewing that the injury to the workman is attributable to his serious and wilful misconduct; so

that the element of negligence may be eliminated from this case. The deceased was doing something which it was his duty to do, though he may have been negligent in doing it. Probably there may be acts of negligence on the part of a workman so entirely outside his employment as to prevent an accident following on the negligent act from being described as arising out of his employment. It is sufficient to say that this is not such a case, and the decision of the learned judge cannot be supported.

There remain to be considered two points arising under s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, which extends the operation of the Act to employment on, in, or about a factory. In this case we are dealing with machinery, and in order to bring it within that section it is first said that it must be shewn that the machinery was being used for the construction, repair, or demolition of a building which exceeds thirty feet in height. There might be some difficulty in saying that this machinery was being so used. It is not necessary to decide that question, for there is another point arising under the same section, which is whether the employment was on, in, or about a factory. The consideration of this point discloses what I must be permitted to call extraordinary legislation. The term "factory" is defined in sub-s. 2 of s. 7, and it is to have the same meaning as in the Factory and Workshop Acts, 1878 to 1891. It is agreed that this case does not fall within that definition. But the definition also includes in the term "factory" any, among other things, machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. We must, therefore, turn to that Act, and, doing so, we find that s. 23, sub-s. 1, applies a number of provisions to a number of things that, for the purposes of the section, are treated as factories which would not otherwise be so. One of the provisions applied by this section is: "(v.) the provisions of this Act with respect to the power to make orders as to dangerous machines," and this is to have effect as if "(*b*) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any

C. A. 1899

McNICHOLAS v. DAWSON & SON.

Collins L.J.

structural work in connection with a building," were included in the word "factory." At first sight it seemed to me that in order to apply the Act of 1897 to the present case it was necessary to make out that the premises which held machinery were a factory within the meaning of that Act, and the difficulty at once arose that the premises themselves are not by this legislation constituted a factory. But, as pointed out by my brother Romer during the argument, the machinery therein is made subject to the above provisions of the Act as though it were in a factory, and therefore it came under the power given by s. 4 of the Factory and Workshop Act, 1895, to a court of summary jurisdiction to make orders as to dangerous machinery in a factory or workshop. The extraordinary result is that by this roundabout process the machinery becomes itself a factory.

By the Factory and Workshop Act, 1895, the premises are treated as a factory for the purpose of reaching the machinery, and the machinery so reached is, by the Workmen's Compensation Act, 1897, itself a factory. A factory within a factory! It is clear to me that an order could have been made by a court of summary jurisdiction under s. 4 of the Act of 1895 on a complaint that this engine was dangerous, and the result is that, for the purposes of the Workmen's Compensation Act, 1897, the employment of the deceased was on, in, or about a factory, and that the decision of the county court judge cannot be supported.

ROMER L.J. I am of the same opinion. With regard to the facts of the case, I think that the deceased, in going under the shaft of the engine whereby the accident was caused, was acting in the course of his employment, whether he intended to open the small door for the purposes of ventilation or for the purpose of going out of the shed. I certainly cannot infer that he was acting outside the scope of his employment and for his own purposes, and it has not been shewn that the injury to him was attributable to his serious and wilful misconduct.

On the other point I will only add a few words. I agree

that the Workmen's Compensation Act, 1897, applies to this case. Sect. 7, sub-s. 1, applies the Act to employment on, in, or about, among other things, a factory. Looking to the definition of a factory in the same section, I find that it includes machinery to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. I turn then to that Act, and I find that by s. 23 certain provisions are to have effect as if any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building, or any structural work in connection with a building, were included in the word "factory." The engine-shed comes within that class of premises, seeing that the principal if not sole use of the engine in it was to mix mortar for the construction of a building. Thus the machinery in the shed was machinery to which one at least of the provisions of the Factory Acts, namely, the power to make orders under s. 4 of the Factory and Workshop Act, 1895, was applied by s. 23 of that Act. The chain is thus complete: the employment of the deceased was on, in, or about a factory within the definition in s. 7 of the Workmen's Compensation Act, 1897, and, the other requirements of the Act having been determined in favour of the applicant, it is a case in which compensation is recoverable.

Appeal allowed.
Judgment for amount agreed on.

Solicitor for appellant: *F. D. W. Hatton, for Fox & Crabtree, Bradford.*

Solicitors for respondents: *William Hurd & Son.*

A. M.

C. A.

1899

March 11, 13, 25.

[IN THE COURT OF APPEAL.]

SEATON *v.* HEATH.
SEATON *v.* BURNAND.

Insurance—Guarantee—Concealment of Material Facts—Contracts in which "uberrima fides" is required.

The doctrine that a contract of insurance is avoided by concealment of material facts on the part of the assured is not confined to contracts of marine, fire, and life insurance, but applies to all contracts of insurance.

On the application of the plaintiff, the defendants, who were underwriters at Lloyd's, underwrote an instrument in the form of a policy whereby in consideration of a premium paid by the plaintiff they guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by the plaintiff:—

Held, that concealment of material facts by the plaintiff would afford a good defence to an action on the instrument.

By Romer L.J.: A contract of guarantee may under special circumstances be one of those contracts in which uberrima fides is required on the part of the person with whom the contract is made, though ordinarily a guarantee is not one of such contracts.

APPLICATION for judgment or a new trial in two actions tried together before Bigham J. with a jury.

The action was in each case by Louisa Christian Seaton against an underwriter at Lloyd's upon an instrument in the following terms: "Whereas Mrs. Louisa Christian Seaton has advanced to Major-General Barwell the sum of 15,000*l.* on his promissory note for 15,000*l.*, dated December 3, 1897, and due on June 3, 1898, and whereas Sir Frederick Seager Hunt, Bart., has guaranteed to the said Mrs. Louisa Christian Seaton the due payment of the said bill for 15,000*l.*, we the undersigned, underwriters, in consideration of a premium of 50*s.* per cent., which we hereby acknowledge to have received, each for himself, and not one for another, hereby guarantee the solvency of the said Sir Frederick Seager Hunt, Bart., in respect of and to an extent of the said bill for 15,000*l.*: no claim to attach to this policy until the said Sir Frederick Seager Hunt, Bart., shall have a receiving order in bankruptcy made against him, or shall call a meeting of his creditors, or, in the event of the

decease of the said Sir Frederick Seager Hunt, Bart., before payment of the said promissory note, his estate be insolvent."

The above document was underwritten by various underwriters for different amounts and among them by the defendants in the two actions. The 15,000*l.* had not been paid to the plaintiff by Major-General Barwell or Sir F. Seager Hunt, the guarantor, and the latter had been obliged to call a meeting of his creditors. Thereupon the actions were brought against the defendants respectively to recover the amounts for which they had underwritten the document above set out.

The defence set up by the defendants respectively was, in substance, that the document was a policy of insurance, and that there had been misrepresentations of fact and a concealment of material facts by the plaintiff, by which the defendants had been induced to execute the policy.

The facts, so far as material to the point upon which this case is reported, namely, the question with regard to the effect of concealment of material facts on the contract, sufficiently appear from the judgment of A. L. Smith L.J. The defendants before executing the document sued upon had made certain inquiries of a banker with regard to the position of Sir F. Seager Hunt and received information from him on the subject.

The learned judge drew up four questions for the jury, which were in substance as follows: 1st, whether the guaranteed transaction was one of exceptional risk; 2nd, whether the plaintiff, or those acting for her, knew it to be so; 3rd, whether the conduct of the plaintiff amounted to a representation that it was not a transaction of exceptional risk; and, 4th, if so, whether the defendants in taking that risk acted on that representation. The jury answered the 1st question in the negative. In view of the answer of the jury to the 1st question, they were not required to answer the 2nd and 3rd questions; but the 4th question was at the request of counsel put to them, and they answered that the defendants acted both upon that representation and upon the information they procured from the banker.

The learned judge on these findings gave judgment for the plaintiff in each action.

C. A. 1899

SEATON v. HEATH. SEATON v. BURNAND.

The defendants thereupon applied for judgment or in the alternative for a new trial on the grounds (in substance) that on the facts admitted and proved they were entitled to judgment, that the learned judge misdirected the jury, the questions left to them not fully or satisfactorily covering all the issues in the action, and that the findings of the jury were against the weight of the evidence.

Sir R. T. Reid, Q.C., and *Lawson Walton, Q.C.* (*Carson, Q.C.*, and *T. W. Chitty* with them), for the defendants. The contract entered into by the defendants respectively was a contract of insurance, and not merely a guarantee, and therefore the doctrine of concealment applies. The evidence clearly shews that material facts were not disclosed to the defendants when the insurance was effected. They were, for instance, not informed of the fact that, notwithstanding the guarantee by Sir F. Seager Hunt, interest was being charged on the loan at the rate of nearly 40 per cent. That fact might obviously have affected the minds of the underwriters with regard to the question whether they would undertake the risk, and if so, at what rate of premium. In this case the plaintiff had recourse to persons who carry on the business of insurers, and the form of the contract and all the circumstances of the transaction point to its being one of insurance. A guarantee is where, upon the negotiation for a contract, one of the parties requires, as a condition of his entering into the contract, that a third person shall enter into a collateral undertaking that the other party will perform the contract, and at the instance of the latter the third person enters into that collateral undertaking. In the case of a guarantee, the principal debtor gets credit on the faith of the guarantee, and the consideration for the guarantee is the entering into the contract, performance of which is guaranteed. Insurance, on the other hand, is where some risk incurred is insured against in consideration of a premium. In this case the contract sued upon was not entered into as a condition of the plaintiff's giving credit to the person to whom she advanced money or at the instance of that person. The contract was really one of insurance for a premium of a

particular event, like the insurance in *Dane* v. *Mortgage Insurance Corporation*. (1) In the case of a guarantee there is a relation between the guarantor and the principal debtor; in the case of an insurance of performance of a contract there is no relation between the insurer and the person liable on the contract. In the ordinary case of a guarantee as a rule it is for the guarantor for himself to ascertain the nature of the risk. In cases of insurance the person who desires to be insured against a risk states to the insurer the risk against which he desires to be insured, and in so doing must disclose all circumstances within his knowledge and not within the knowledge of the insurer which are material for the purpose of enabling the insurer to estimate the character of the risk; and, if he conceals any material circumstance, the insurance is vitiated. The doctrine of concealment is not confined to cases of marine, fire, or life insurance, but applies to all kinds of insurance. There is no reason why there should be any distinction for this purpose between different kinds of insurance. It is a general principle of insurance law that the only risk which the insurer undertakes is the risk as represented to him, and, if circumstances are concealed, which, if they had been disclosed, would have altered the character of the risk, the underwriters cannot be made liable.

[They cited on this point *London Assurance* v. *Mansel* (2); *Owen* v. *Homan* (3); *Lindenau* v. *Desborough*. (4)]

Assuming the contract sued upon to be one of guarantee, and not of insurance, concealment of facts which render the risk one of an exceptional nature will avoid a guarantee. The first question put to the jury was no doubt framed on the assumption that the instrument was a guarantee, and was intended to be based on what was said by Lord Campbell in the case of *Hamilton* v. *Watson* (5); but the learned judge did not sufficiently explain to the jury the meaning of the term "exceptional risk" in this connection.

(1) [1894] 1 Q. B. 54.
(2) (1879) 11 Ch. D. 363.
(3) (1851) 3 Mac. & G. 378, at p 396.
(4) (1828) 8 B. & C. 586.
(5) (1845) 12 Cl. & F. 109.

C. A. 1899

SEATON v. HEATH. SEATON v. BURNAND.

Taking into consideration what was stated to the defendants with regard to the loan transaction, and also what was not disclosed, it is submitted that there was clear evidence of a misrepresentation of the character of the risk to the defendants. A statement that is in itself not false may, if it be only part of the truth, by implication amount to a misrepresentation. (1)

[They cited on this point *Pidcock* v. *Bishop* (2); *Stone* v. *Compton* (3); *Phillips* v. *Foxall.* (4)]

Sir E. Clarke, Q.C., and *Joseph Walton, Q.C.* (*Scrutton* with them), for the plaintiff. The cases shew that the doctrine of concealment does not apply to guarantees, and that they stand on the same footing in this respect as ordinary contracts. Fraud or misrepresentation of fact will avoid a contract of guarantee, as it will avoid any other contract, and, of course, there may be a partial statement of the facts which by implication amounts to a misstatement of fact; but mere non-disclosure of facts will not avoid a guarantee any more than it will in general avoid other contracts: *Lee* v. *Jones* (5); *Railton* v. *Mathews* (6); *North British Insurance Co.* v. *Lloyd* (7); *Davies* v. *London and Provincial Marine Insurance Co.* (8) There may in some cases be a misrepresentation by implication, and it has been said that in the case of a guarantee there may be an implied representation that the transaction is one of the ordinary kind which a guarantor would expect, and not one of an exceptional nature such as he could not be supposed to contemplate, e.g., in the case of a guarantee for the fidelity of a clerk there may be an implied representation that the clerk has not previously been detected in dishonesty: *Hamilton* v. *Watson.* (9) But that is simply an illustration of the doctrine

(1) The case being reported only upon the point of law as to concealment, the facts are not stated with regard to the alleged misrepresentations, and the argument as to whether there was evidence of misrepresentations by which the defendants were induced to enter into the contract is only briefly indicated for the purpose of explaining the reference to that question in the judgment.

(2) (1825) 3 B. & C. 605.

(3) (1838) 5 Bing. N. C. 142.

(4) (1872) L. R. 7 Q. B. 666.

(5) (1864) 17 C. B. (N.S.) 482.

(6) (1844) 10 Cl. & F. 934.

(7) (1854) 10 Ex. 523.

(8) (1878) 8 Ch. D. 469.

(9) 12 Cl. & F. 109.

that a contract may be avoided by misrepresentation, and has no peculiar application to the case of a guarantee. It has not been held in any case that a mere concealment of material facts without fraud or misrepresentation avoids a contract of guarantee as it does a contract of marine insurance. The verdict of the jury negatived the suggestion that there was anything exceptional in the transaction with reference to which the defendants contracted, and therefore it must be taken that there was no such misrepresentation as would bring the case within the doctrine laid down in *Hamilton* v. *Watson*. (1) It is suggested that the contract in this case is one, not of guarantee, but of insurance. It is really a contract of suretyship of a limited and restricted nature, a contract to pay to the plaintiff the money advanced, if the debtor makes default and certain other circumstances exist. It is none the less a contract of suretyship because it was not entered into at the request of the principal debtor. The term "insurance" may perhaps be applicable to it in a loose sense, for any contract by which one person contracts to indemnify another may in one sense be said to be a contract of insurance; but it is not a contract of insurance to which the doctrine of concealment applies. In the case of a contract of marine insurance it has long been settled law, which was probably originally founded on mercantile custom, that any concealment of a material fact however innocent avoids the insurance; and it may be assumed for the present purpose that the same principle applies to fire and life insurance. There is no case in which this doctrine has been applied to any contract of insurance save contracts of marine, fire, and life insurance, and it is submitted that it is not founded on any general principle which would render it applicable to contracts of insurance in the loose sense in which the term is applied to a contract like that which is at present in question. There was no evidence of misrepresentation, and, the contract having been acted on, it could not be avoided on the ground of misrepresentation. (2)

Lawson Walton, Q.C., in reply.

Cur. adv. vult.

(1) 12 Cl. & F. 109.

(2) Ante, p. 786, n. (1).

C. A. 1899

SEATON v. HEATH. SEATON v. BURNAND.

March 25. A. L. SMITH L.J. read the following judgment:—This is an action against underwriters at Lloyd's to recover the sums underwritten by them, and they seek to have a verdict which has passed against them set aside and judgment entered for them or a new trial on the ground of misdirection, and that the verdict was against the evidence.

As, for the reasons I am about to give, the case will have to be retried, I will touch as lightly as possible upon the undisputed facts so as not to prejudice the retrial, but I must refer to some of the facts in order that I may explain the reason why I have arrived at the conclusion which I have. It will be sufficient to state that it appears from the undisputed evidence that in the month of December, 1897, the plaintiff, who is a married lady, advanced by way of loan to Major-General Barwell the sum of 12,375*l.* in cash, taking from him his promissory note at six months for 15,000*l.*, and that at this time the credit of the major-general was such that she not only charged him between 39 and 40 per cent. interest for the loan, but in addition thereto she took the guarantee of Sir F. Seager Hunt to secure its repayment. This loan was composed of the 12,375*l.* cash and 2625*l.* interest, making 15,000*l.* in all. Not content with this promissory note of the major-general and the guarantee of Sir F. Seager Hunt (in neither of which was the amount of interest she was charging mentioned), the plaintiff proceeded to insure with underwriters at Lloyd's the solvency of Sir F. Seager Hunt to the extent of 15,000*l.* For this purpose she employed a Mr. Lion to act on her behalf and to get a policy effected for her at Lloyd's undertaking this risk. She told him nothing as to the interest she was charging for the loan to the major-general, nor as to the way the 15,000*l.* was made up. Mr. Lion accordingly saw some leading underwriters upon the matter, and one thing he said to them—and this is undisputed—was that Sir F. Seager Hunt was a man of wealth, and that the money was being advanced by a lady who was a friend of his, and this he no doubt honestly believed, though as a matter of fact upon March 11, 1898, about three months after the policy was effected, Sir F. Seager Hunt called his creditors together and failed for a very large sum of money.

Now this case must be dealt with as if Mrs. Seaton had gone herself direct to the underwriters at Lloyd's to effect this insurance, knowing right well the way the 15,000*l.* was arrived at, and that, with the additional security of Sir F. Seager Hunt's guarantee, she would only lend money to the major-general at just under 40 per cent., and had herself stated to the underwriters what Mr. Lion stated to them.

Upon these facts, and they are not in dispute, it appears to me that the following, amongst other questions, certainly ought to have been left to the jury—namely, whether, taking into account the statement made to the underwriters, it was a concealment of a material fact not to disclose to them the circumstances under which the loan to the major-general had been made and the rate of interest which was demanded and obtained. That these facts were known to the assured and not to the underwriters is beyond dispute. It is said on behalf of the plaintiff that the document sued on is not a policy of insurance, but a guarantee, and that different considerations arise, and that the non-disclosure of material facts forms no defence to an action upon a guarantee, even although it be a guarantee of the kind contained in the document now in suit. In the view I take of this case I do not propose to discuss this point which was so much debated at the bar, though I do not desire to be thought as agreeing to the proposition, for I have no doubt that the document taken from the underwriters is a policy of insurance, and that the principles applying to all policies of insurance apply to the present case. The parties to the contracts (for they are many) have throughout dealt inter se as though the document was a policy of insurance. Moreover, it guarantees no debt, for it only covers the risk of Sir F. Seager Hunt becoming insolvent. Although, if neither the major-general nor Sir F. Seager Hunt repaid the loan, that would not affect the underwriters unless the latter became insolvent, yet the circumstances attending the loan to the major-general might well be material for the underwriters to know, for, if the major-general or Sir F. Seager Hunt was a person likely to repay, and did repay, the loan, that would end the matter so far as the underwriters' liability was concerned. In form, too,

C. A. 1899

SEATON v. HEATH. SEATON v. BURNAND.

A. L. Smith L.J.

the document is that of a policy of insurance, and the cases of *Dane* v. *Mortgage Insurance Corporation* (1) and *Finlay* v. *Mexican Investment Corporation* (2) shew that it is so. Now the plaintiff by her agent applied direct to the underwriters at Lloyd's to underwrite the risk she desired to cover, and the underwriters in ordinary course first initialled a slip and then followed it up by the policy, the underwriters thereby accepting the separate risks of their respective lines in consideration of the premiums paid by the plaintiff.

In these circumstances it was next argued on behalf of the plaintiff that, though this might be a policy of insurance, yet it was not a marine, fire, or life policy, and that it is only in actions upon such policies that the defence of concealment of a material fact avails an underwriter. I do not understand the validity of this argument, or why, when a person insures his ship, or his house, or his life, he should be bound to disclose material facts of which he is cognisant and the underwriter is not, and yet not be bound to disclose such facts when an underwriter is asked to take a risk upon, say, the soundness of a racehorse; and, indeed, from what Lord Cranworth said in *Dalglish* v. *Jarvie* (3) and Sir George Jessel in *London Assurance* v. *Mansel* (4), there does not appear to be any such distinction as is now contended for. The well-known case of *Carter* v. *Boehm* (5) is very instructive upon this matter. The question which was left by the learned judge to the jury—namely, was the guaranteed transaction one of exceptional risk—appears to me not to cover the case adequately, and it apparently was framed upon the assumption that the document was a guarantee and not a policy of insurance, and is taken from what is to be found in the case of *Hamilton* v. *Watson*. (6) If the document were a guarantee and not a policy of insurance, I should have to discuss the question as to whether, upon such a guarantee as this, non-disclosure of material facts may not afford a defence to a surety; but, however that may be, there still would remain the objection to the direction taken by the defendants' counsel,

(1) [1894] 1 Q. B. 54.
(2) [1897] 1 Q. B. 517.
(3) (1850) 2 Mac. & G. 231, at p. 243.
(4) 11 Ch. D. 363.
(5) (1766) 3 Burr. 1905.
(6) 12 Cl. & F. 169.

that the learned judge did not expound to the jury the meaning of the term "exceptional risk." If the term means a risk not often accepted, and the jury had answered as they did, "No," I can understand the answer; but if it means a risk which, in the circumstances in which it was tendered to the underwriters, was exceptional in the sense that it in fact differed materially from what the underwriters on the facts disclosed might naturally suppose it to be, and the jury said "No," that is an answer which upon the facts appears to me to require reconsideration.

I have now dealt with this case sufficiently to shew why I think that it must go down for a new trial. I cannot enter judgment for the defendants, as I have been invited to do; for whether the non-disclosure of the circumstances attending the loan to the major-general was material or not to the risk underwritten is a question of fact which a jury must determine, and not of law; and, moreover, as to this there must be taken into consideration by the jury what the underwriters did when they applied to Mr. Shand, of Parr's Bank, for information as to what he knew of Sir F. Seager Hunt's paper, as it is called, being afloat, and also the materiality of the loan not having been made at the time the policy was effected. (1) In my opinion, the questions which should be left to the jury should embrace the following considerations: Whether, taking what was stated with what was left unstated, there was a concealment, designed or undesigned, varying materially the risk understood to be run; whether there was any misstatement of a material fact, and, if so, whether the defendants were influenced by such misstatement in underwriting the policy. The costs of the first trial must abide the event of the second trial; and as the defendants did not protest, but rather acquiesced in the question being left to the jury by the learned judge in the way it was, I think that the costs of this appeal should also abide the result of the second trial.

COLLINS L.J. agreed with the judgment of A. L. Smith L.J.

(1) The last part of this sentence refers to a point which it was not thought material to go into for the purposes of this report, and as to which therefore the facts, which were in dispute, are not stated.

C. A. 1899

SEATON v. HEATH. SEATON v. BURNAND.

ROMER L.J. read the following judgment:—I agree that in this case there should be a new trial. Upon the special circumstances I do not think it necessary to add anything to what has been said by A. L. Smith L.J. But I desire to make some remarks upon the question of general importance raised in this case with reference to the contract of insurance or guarantee. There are some contracts in which our Courts of law and equity require what is called 'uberrima fides' to be shewn by the person obtaining them; and, as that phrase is short and convenient, I will continue to use it. Of these, ordinary contracts of marine, fire, and life insurance are examples, and in each of them the person desiring to be insured must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him. On the other hand, ordinary contracts of guarantee are not amongst those requiring 'uberrima fides' on the part of the creditor towards the surety; and mere non-communication to the surety by the creditor of facts known to him affecting the risk to be undertaken by the surety will not vitiate the contract, unless there be fraud or misrepresentation, and misrepresentation undoubtedly might be made by concealment. But the difference between these two classes of contract does not depend upon any essential difference between the word "insurance" and the word "guarantee." There is no magic in the use of those words. The words, to a great extent, have the same meaning and effect; and many contracts, like the one in the case now before us, may with equal propriety be called contracts of insurance or contracts of guarantee. Whether the contract be one requiring 'uberrima fides' or not must depend upon its substantial character and how it came to be effected. There is no hard and fast line to be drawn between contracts of insurance and contracts of guarantee for the purpose for which I am now considering them; and certainly the rule as to contracts of insurance is not limited, as contended, to the three forms of marine, life, and fire insurance: see the observations of Jessel M.R. in *London Assurance* v. *Mansel*. (1) Now when contracts of insurance are considered it will be seen that, speaking generally, they have in common several features in their

(1) 11 Ch. D. 363.

character and the way they are effected which distinguish them from ordinary contracts of guarantee. Contracts of insurance are generally matters of speculation, where the person desiring to be insured has means of knowledge as to the risk, and the insurer has not the means or not the same means. The insured generally puts the risk before the insurer as a business transaction, and the insurer on the risk stated fixes a proper price to remunerate him for the risk to be undertaken; and the insurer engages to pay the loss incurred by the insured in the event of certain specified contingencies occurring. On the other hand, in general, contracts of guarantee are between persons who occupy, or ultimately assume, the positions of creditor, debtor, and surety, and thereby the surety becomes bound to pay the debt or make good the default of the debtor. In general, the creditor does not himself go to the surety, or represent, or explain to the surety, the risk to be run. The surety often takes the position from motives of friendship to the debtor, and generally not as the result of any direct bargaining between him and the creditor, or in consideration of any remuneration passing to him from the creditor. The risk undertaken is generally known to the surety, and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety should take upon himself to ascertain exactly what risk he was taking upon himself. In all the reported cases of guarantees that I have been able to find, in which it has been held that the party guaranteed owed no duty to the guarantor as to disclosure of material facts, the contracts, when examined, are found to have in substance, though of course not in every detail, the characteristics which distinguish contracts of guarantee from contracts of insurance as above stated by me. Applying the above considerations to the contract in the case before us, it appears to me that the contract is one which required 'uberrima fides' on the part of the insured.

New trial ordered.

Solicitors for plaintiff: *Thomas Cooper & Co.*
Solicitors for defendants: *Morten, Cutler & Co.*

E. L.

C. A.
1899
March 3, 10.

[IN THE COURT OF APPEAL.]

In re GIEVE.

Stock Exchange — Contract — "Differences" — "Cover" System — Delivery — Acceptance — "If Demanded" — Option — Gambling Transaction — "Gaming or Wagering" — Nullity — Gaming Act, 1845 (8 & 9 *Vict.* c. 109), *s.* 18.

A contract on the "cover" system between two stock and share dealers for "differences" is a contract "by way of gaming or wagering" and therefore void under s. 18 of the Gaming Act, 1845: and it is none the less so where the contract gives the buyer or seller an option to demand delivery or acceptance (as the case may be) of the stocks or shares the subject-matter of the contract.

Universal Stock Exchange v. *Strachan*, [1896] A. C. 166, considered.

APPEAL by the trustee in the bankruptcy of Alfred Lang Gieve from a decision of Wright J. allowing proof of a claim by a creditor, James Moss, in respect of certain stock and share transactions between himself and the bankrupt. The question was whether the transactions in question were gambling transactions and therefore void under s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109).

The facts were shortly these.

The bankrupt, Gieve, had carried on business in London and elsewhere as an outside dealer in stocks and shares under the name of "John Shaw," and for some years Moss, who was a commission agent in a small way of business in Manchester, had had dealings with him on the "cover" system. Moss's claim consisted of two sums, (1.) 195*l.* claimed to be due to him from Gieve on the balance of account in respect of stocks and shares bought from and sold to him, Moss, by Gieve between March and September, 1897; and (2.) 2128*l.* damages for the non-delivery of certain shares in the Canadian and Pacific Railway bought by Moss in May and June, 1897, and delivery of which he said he had demanded on December 7, 1897. The following is a sample of the form of "sold note"

between the parties: "London, 21st April, 1897.—John Shaw to J. Moss, Esq.—I beg to advise having sold to you—

	Cover.	Price.
"20 Canadas	1%	50⅛

"Plus ⅛th if stock is taken up. For account, end April. Errors excepted. Subject to the conditions at back." The indorsed "conditions of contract" were as follows:—

"1. All stocks or shares become closed without notice whenever the cover is exhausted, so as to limit the liability of the operator, unless arrangements are made to the contrary.

"2. All stocks or shares, unless closed prior to the first day of the account, must either be taken up or carried over to the next account.

"3. If contangoes or backwardations are not settled separately, the cover will be increased or reduced by the same amount.

"4. If it is desired to increase cover, cash must accompany order before the margin is reached, unless arrangements are made to the contrary. And any orders for increasing cover, if not altered before the close of business on one day, must hold good till the opening price of the next day.

"5. It is to be distinctly understood that I am prepared to deliver the stock or shares to which this contract refers, if demanded, but require cash on the first day of the account for securities I have to deliver to customers."

A "bought note" was similar in form: "John Shaw to J. Moss, Esq.—I beg to advise having bought of you 20 Canadas, to close at 52¼. Less ⅛th if stock is delivered. For account Mid. May. Errors excepted. Subject to the conditions at back."

The indorsed "conditions of contract" were similar to those on a sold note, with necessary alterations; condition 2 containing this addition: "If to be delivered, the certificate or scrip must reach me before twelve o'clock on the first day of the account"; and condition 5 being: "It is distinctly understood that I am prepared to accept delivery of the stock or shares to which this contract refers, if required, and

C. A. 1899

GIEVE, *In re.*

will pay cash if desired at any time, subject to discount for cash."

In November, 1897, Moss brought an action against Gieve to recover the 195*l.*, and on January 21, 1898, obtained judgment under Order XIV., r. 1, for that amount and costs.

In an affidavit filed in that action Moss stated that he was prepared to accept delivery of the shares in accordance with clause 5 of the conditions of his contract, and Gieve in an affidavit admitted that Moss had the right to take delivery on complying with the conditions of the contract, but that Moss had not as a fact paid cash for the shares on the first day of the account as required. He further, by way of defence to the action, charged Moss, in an affidavit of December 10, 1897, with having acted in collusion with his, Gieve's, manager, and that the two had together conspired to defraud him. Gieve's defence was, however, set aside, and final judgment was given as above stated.

The judgment remained unsatisfied, and ultimately Gieve was made a bankrupt, whereupon Moss carried in for proof a claim for 2323*l.*, made up of the 195*l.*, and of a sum of 2128*l.* by way of damages for non-delivery of certain Canadian and Pacific shares said to have been bought by him from the bankrupt in May and June, 1897, and delivery of which he, Moss, alleged to have demanded in December, 1897. The trustee, however, rejected the whole of the claim on the ground that it arose out of a gambling transaction. Moss then appealed to Wright J. (sitting in bankruptcy) by motion against the finding of the trustee. Moss was examined and cross-examined upon the motion, when it was elicited that he was a man of very small means living with his wife in apartments at 10*s.* a week: that he had had dealings with Gieve in stocks and shares for a considerable time: that the transactions consisted in speculations with Gieve, in which the "differences" were given or received on the rise or fall of stocks and shares, Moss giving Gieve "cover" of 1 per cent., and those "differences" being the subject of periodical accounts between them; and that prior to the dealings in the Canadian and Pacific shares in 1897 the transactions had been very small. Moss further

deposed that he had frequently demanded delivery of the shares, but admitted that he had not paid, or even offered to pay, cash on the shares on the first day of the account as required by his contract as a condition for delivery, and that he was never in a position to pay for the shares without borrowing. He swore positively that the last occasion on which he demanded delivery was on November 9, 1897 (Lord Mayor's Day), at an interview with Gieve in London. Gieve was also examined and cross-examined. In the course of his evidence, a letter dated December 7, 1897, was read, addressed by Moss's solicitors to Gieve's solicitors, demanding delivery of the Canadian and Pacific shares alleged to have been bought by him, Moss, from Gieve. Gieve said that his affidavit of December 10, 1897, charging collusion, was his answer to that demand; but he admitted that at that time Canadian and Pacific shares had gone up in price, and that he was not able to deliver, and consequently did not call upon Moss to pay. He positively denied that at the interview on Lord Mayor's Day Moss asked him to deliver the shares or made any claim to them at all, the conversation relating exclusively to the account between them of differences, including the differences on the Canadian and Pacific shares.

Wright J., in giving judgment, said that, though there was the gravest suspicion that the transactions between the parties were purely gambling transactions, there was not sufficient evidence that the parties had laid their heads together to conceal a bargain for differences only under cover of a bargain which, though no doubt primâ facie resulting in differences only, was yet to some extent a real bargain; and that the case did not come within the decision of the House of Lords in *Universal Stock Exchange* v. *Strachan* (1), which had been relied on by the trustee. He accordingly reversed the trustee's rejection, and ordered Moss's proof to be admitted at 2000*l*. From that decision the trustee appealed.

Reed, Q.C., and *Carrington*, for the appellant, the trustee. The learned judge below has not given effect to what is the

(1) [1896] A. C. 166.

C. A. 1899

GIEVE, *In re.*

real nature of the transaction—a gambling in differences. From the evidence it is quite clear that the contract between the parties was not one for the delivery or acceptance, as the case might be, of stocks or shares, for there is no evidence of any delivery or acceptance by either party at any time during their transactions, and it is established that Moss is a person of no means and quite unable to take up any stocks or shares whatever. The mere fact that either party may require delivery or acceptance of stocks or shares does not take the contract out of s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), which says that "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void": *Universal Stock Exchange* v. *Strachan.* (1)

Muir Mackenzie, for the respondent, Moss. The question whether a transaction is a gambling transaction or not, is one of fact, to be ascertained from the evidence of the nature of the transaction. Here there is a contract for delivery or acceptance of stocks or shares, a contract enforceable by either party—at all events there is no evidence that it is not enforceable: on the contrary, Gieve admits in his affidavit that Moss had the right to delivery. That being so, the contract cannot be said to be a mere gambling transaction for differences: *Universal Stock Exchange* v. *Stevens* (2); *Shaw* v. *Caledonian Ry. Co.* (3)

LINDLEY M.R. We are all agreed that the judgment of the Court below cannot stand. I will state shortly why. The question turns upon the construction of s. 18 of the Gaming Act, 1845, which says that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void." Now is this a contract "by way of gaming or wagering" within that section? Of course, if it is an agreement simply to buy and sell stock for delivery and payment, the statute has no application. But, on the other hand, if the real effect of this contract is to stipulate for the payment of differences, it is plainly a gambling transaction.

(1) [1896] A. C. 166, 173. (2) (1892) 40 W. R. 494.
(3) (1890) 17 R. 466, 475 *et seq.*

That has been settled by a series of decisions. Where the learned judge below has, in my opinion, gone wrong is by not attending sufficiently to the form of the agreement itself. On the face of it, I think it is a gambling transaction. It runs thus: "I beg to advise having sold to you 20 Canadas" at a certain price If that were all, it would be an ordinary sold note: there would be nothing on the face of it to shew it did not mean what it said. It might, no doubt, be proved by parol evidence that the contract did not represent the real meaning of the parties; but here we have something else which, to my mind, is quite conclusive—"plus $\frac{1}{8}$th if stock is taken up." The expression "if" taken up shews plainly that the parties do not intend that the stock shall be taken up: that the buyer need not take it up at all unless he chooses, but that if he does he is to pay the extra one-eighth. This is not, on the very face of it therefore, a bargain for sale and purchase at all, and this is where Wright J. has, in my opinion, failed to give effect to the real intention of the parties as expressed by the terms of the bargain.

Then looking at the "conditions," what do we find? [The Master of the Rolls read them, and continued:—] Now these conditions, to my mind, make the transaction look much more like a bargain for differences than an ordinary sale of stock. It appears to me that the true meaning of this contract, and the effect really intended by both parties, to be gathered from the language used, is this: "This is a bargain for differences, but if you, the buyer, like to pay $\frac{1}{8}$th more, then I, the seller, will deliver at the increased price."

That gives rise to a question of law—whether such a contract is within the statute. The decision of the House of Lords in *Universal Stock Exchange* v. *Strachan* (1) is very important on this question. There counsel appear to have argued (2), "Even if the present contracts were for the payment of differences only, the power in either party to turn them into real contracts of sale and purchase by insisting upon delivery prevents them from being contracts of gaming and wagering within the Act of 1845." I can understand how that argument was put forward:

(1) [1896] A. C. 166. (2) [1896] A. C. 169.

C. A. 1899

GIEVE, *In re*.

Lindley M.R.

it was based partly on *Shaw* v. *Caledonian Ry. Co.* (1) and partly on *Universal Stock Exchange, Limited* v. *Stevens* (2); but the House of Lords repudiated it, and Lord Herschell said (3) that he should require much consideration before he gave his assent to such a proposition.

So it comes to this, that if you have an agreement which is a wagering agreement for differences, and superadded to that the purchaser has the option of purchasing the stock, that is none the less an agreement for gaming or wagering. It is a gaming transaction plus something else. Here it is said that the purchaser found the stock rising in the market and wanted to take it up. He says that on November 4, 1897 (Lord Mayor's Day), he applied to Gieve for delivery. Gieve denies that, but, at all events, delivery was demanded on December 7. Gieve, however, was not able to deliver. To say that this was not a transaction for gaming or wagering is wrong. This was a bargain for differences plus an option to purchase. There was no obligation whatever on the buyer to accept delivery; nor on the seller to deliver except upon payment of the extra one-eighth: he never could have called upon the buyer to pay this extra sum; had he done so the buyer might have answered that he would only pay the difference.

In my opinion the learned judge was wrong, and the appeal must be allowed.

RIGBY L.J. I am of the same opinion. The real question is, What is the true construction of this contract note? The very condition that it is to be optional for the purchaser to take up the stock shews that he is not bound to do so. He may do so if he chooses, by paying an extra sum, but not otherwise. This, therefore, is a contract for the payment of differences, and for nothing else. No doubt these conditions are put in to make it appear that they are intended to protect the selling broker, but I am glad to say they are not sufficient to blind this Court to the real nature of the transaction, which was that there was no intention whatever to deliver or accept stock:

(1) 17 R. 466, 475 *et seq.* (2) 40 W. R. 494.
(3) [1896] A. C. 166, at p. 173.

the conditions are not intended to be acted upon at all. If the purchaser had an extraordinary run of luck, then he might perhaps demand delivery, but I do not find that he ever complied, or offered to comply, with the condition as to the payment of the additional one-eighth. I do not see that the seller was under any obligation to keep the stock for any length of time, and then, perhaps months afterwards, when the purchaser came and demanded delivery, to comply with that demand. The seller's answer in such a case would be that the contract was only for the payment of differences. There was a condition for the payment of money on the first day of the account if the stock was to be delivered; and as that was not complied with, the purchaser must be taken never to have applied for delivery. The agreement is an agreement for the payment of differences; it is not a genuine transaction of sale and purchase, but merely gives one of the parties to it an option to turn it into a real transaction of sale and purchase. The transaction is substantially, according to the intention of both parties, a gaming transaction, and I think that, if Wright J. had had his attention more directly called to this agreement, he would have taken that view of it.

VAUGHAN WILLIAMS L.J. I agree. This proof was rejected on the ground of the transaction being a gambling transaction. I have no doubt that the proper finding of fact is that these transactions between Moss and Gieve were gambling transactions. Wright J. came to a different conclusion on the facts. If I thought that the learned judge's conclusion on the facts was based on the credit he gave to the witnesses who gave oral evidence before him, I should hesitate very much before I gave effect to a different view in my own mind as to that evidence. I consider it a matter of the highest importance, that when witnesses have given oral evidence and the tribunal, whether a judge or a jury, before whom that evidence has been given has believed that evidence and has given the witnesses the credit of being the witnesses of truth, one should not arrive at a different conclusion from the judge or jury who has heard those witnesses. But I do not understand that Wright J.

C. A. 1899

GIEVE, *In re.*

Vaughan Williams L.J.

really based his conclusion on the credit to be given to the witnesses: it appears to me that he did not place any reliance on the evidence one way or the other, but that he based his judgment on the inferences he drew from the documents in the case and from the fact that the contracts, on the face of them, gave to Gieve's customers the right to call for delivery or acceptance of the stock the subject-matter of the contracts. With regard to the action brought by Moss against Gieve, apparently the learned judge saw that, notwithstanding the form of the contract—taking into consideration that the contract was, on the face of it, a contract to deliver to the customer, or giving him the right to call for delivery of, the subject-matter of the contract—Moss, in bringing his action against Gieve, proceeded on the assumption that he had a right to call for delivery, and that this prevented the Court from drawing any inference that there was a secret bargain or understanding or practice between the parties inconsistent with the contract as shewn by the documents. I do not agree with the learned judge in the inference he drew. I think that, notwithstanding that action, that is not the right inference to draw. I have mentioned this matter at some length because I am not sure I am prepared to say that this contract is, on the face of it, a gambling contract, or to say that this is a contract which, so far as its terms are concerned, did not entitle either party to call for the delivery or acceptance, as the case might be, of the stock. I am rather inclined to the view that the contract is one which entitled Moss to insist on the delivery or the acceptance of stock. Therefore I base my judgment on the same grounds as those upon which the opinions of the learned Lords were based in *Universal Stock Exchange* v. *Strachan* (1)—that is to say, assuming that this contract is a contract which, on the face of it, would enable one or both of the parties to insist on delivery or acceptance, the mere fact that the contract contained such a term would not prevent the Court from asking the question whether the transactions between the parties were really based on the contract, if that was the true meaning of it, or—to use the words

(1) [1896] A. C. 166.

of Cave J. in his summing-up to the jury in *Universal Stock Exchange* v. *Strachan* (1)—"notwithstanding those ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, then he is not entitled to recover them."

In my judgment, if you look at the whole of the transaction in the present case, the proper inference to draw is that neither of the parties ever contemplated delivery or acceptance of stock, but that both of them intended that the matter should be dealt with as a matter of differences only, and not of delivery or acceptance; and when I ask myself the question whether that is a proper conclusion of fact, I think that the condition as to, in the one case, the payment of an additional one-eighth if the stock is taken up, and as to, in the other case, the deduction of one-eighth if the stock is delivered, shews that these parties were minded to prepare a contract between them which should facilitate that which was their sole object, namely, gambling in differences. And each of the conditions on the back of the contract points to the same conclusion. The whole form of the transaction is just what one would have expected if the parties were minded to gamble in differences but were anxious to put the contract into such a form as to cloke or conceal the fact that they were gambling. Then, when one adds to that the history of the transactions from beginning to end, the conduct of the parties leads almost necessarily to the inference that they only intended gambling transactions.

One thing urged against that is the fact of the action having been brought by Moss and the correspondence that passed between the parties at that time. I do not think that the bringing of that action and the facts stated in the affidavits alter the past between the parties; and the fact that Gieve did not set up as a defence that the transaction out of which the claim arose was a gambling transaction does not, in my opinion,

(1) [1896] A. C. 166.

C. A. 1899

GIEVE, *In re.*

Vaughan Williams L.J.

lead to the inference that would otherwise have followed from it. It is obvious that an outside dealer who is carrying on a gambling business cannot afford to set up the defence that the transactions in question were gambling transactions in order to evade payment, for that would ruin his business. If you exclude that fact, all that remains is the conduct of Moss in demanding delivery. When you come to look at the transaction, I am not satisfied that Moss ever wanted or intended to take delivery at all. I doubt whether he was in a position to do so; and, in my opinion, the demand made by him was a mere stratagem on his part to recover the winnings he had made in these gambling transactions.

LINDLEY M.R. The appeal must be allowed, and the proof must be expunged. The trustee must have his costs both here and below.

Appeal allowed.

Solicitors: *Ingle, Holmes & Sons; Chester & Co., for Lawson, Coppock & Hart, Manchester.*

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 11.

MOUNTAIN *v.* PARR.

Employer and Workman—Compensation—Jurisdiction of County Court Judge—New Trial—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37).

A county court judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1897, is acting as an arbitrator only, and has no jurisdiction to grant a new trial.

APPEAL from the decision of the judge of the Nottingham County Court upon a question of law under the Workmen's Compensation Act, 1897.

The respondent, who was a workman in the employ of the appellant, had claimed compensation from the latter under the provisions of the Act. The application was heard before the county court judge on November 15, 1898, and resulted in an award in favour of the applicant, the present respondent. No appeal against the award was brought to the Court of Appeal within twenty-one days, the time limited for appealing; but on December 10 notice was given by the present appellant of his intention to apply to the county court judge for a new trial. On December 21 an application for a new trial was made before the county court judge, when an objection was taken on behalf of the respondent that the judge had no jurisdiction to entertain the application. The learned judge was of opinion that under rule 64 of the Workmen's Compensation Rules, 1898, he had jurisdiction, but refused to grant a new trial; from this refusal the present appeal was brought.

Etherington Smith, for the respondent. There is a preliminary objection to the hearing of this appeal. The county court judge had no jurisdiction to entertain an application for a new trial, and no appeal will therefore lie from his refusal to grant one. The only right of appeal given by the Act is that contained in Sched. II. (4.), which makes the decision of the judge on a point of law final unless either party appeals to the Court of Appeal within the time prescribed by the Rules of the Supreme

C. A. 1899

MOUNTAIN v. PARR.

Court; it is apparent from Order LVIII., r. 20, and Order LIX., rr. 10, 12, that twenty-one days is the time limit imposed upon appeals under this Act, and that the appellant was out of time for appealing direct to this Court. A county court judge sitting to hear applications under the Workmen's Compensation Act is sitting as an arbitrator only, and not as a county court judge, and therefore the rules as to new trials are not applicable to cases under the Act; the whole scheme of this legislation, and especially s. 1, sub-s. 3, of the Act, and Sched. II. (4.) shew the judge to be merely an arbitrator. There is no provision in the Act itself, or in the rules made under it, for a new trial or rehearing; but it was contended that jurisdiction to grant a new trial was impliedly given to the judge by rule 64. That rule, however, is concerned with procedure only, and gives no right to the parties not given by the Act itself. There is no provision in the Act or rules for the review of a decision on a question of fact, except the provision in Sched. I. (12.), giving power to review a weekly payment at the request of either party. Further, assuming that the judge had jurisdiction to grant a new trial, any appeal from his refusal must be under s. 120 of the County Courts Act, 1888, and must be brought to the Divisional Court, and not to the Court of Appeal.

W. H. Stevenson, for the appellant. Admitting that the county court judge is made an arbitrator by the Act, the proceedings for compensation are an action in all but the name. The Arbitration Act, 1889, is (by Sched. II. (4.)) not to apply to an arbitration under this Act, and the effect of the Workmen's Compensation Rules, 1898, is to incorporate the County Court Rules and procedure, and to assimilate the proceedings to those in an ordinary county court action. By rule 1 (4.) of the Workmen's Compensation Rules these rules are to be read and construed with the County Court Rules, 1889, and the County Court Rules of subsequent date amending the same; rule 24 makes the procedure in an arbitration the same as that in an ordinary county court action, part of which is the procedure relating to an application for a new trial, and rule 64 adopts the county court procedure in matters not specially pro-

vided for by the rules. (1) The judge had, therefore, jurisdiction to grant a new trial.

Etherington Smith was not called upon to reply.

A. L. SMITH L.J. I am of opinion that the point of law taken on behalf of the respondent is a good one, and that the county court judge had no power to grant a new trial. When sitting to hear applications under this Act a county court judge is sitting merely as an arbitrator; from beginning to end the Act treats him as an arbitrator and nothing more. Sect. 1, sub-s. 3, provides that "if any question arises in any proceedings under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act"; in other words, if the master and man do not agree, the question in dispute between them is to be settled by arbitration under the 1st and 2nd schedules. The 1st schedule deals with the amount of compensation, if any is recoverable; it is headed "Scale and Conditions of Compensation," and a consideration of all the sub-sections shews that to be a fair representation of its subject-matter. Sub-s. 12 of that schedule provides that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be

(1) By rule 24 of the Workmen's Compensation Rules, 1898, "Subject to the special provisions of these rules, the procedure in an arbitration shall be the same as the procedure in an action commenced in the county court by plaint and summons in the ordinary way, and determined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration accordingly; and in the application of such provisions and rules the applicant's request for arbitration shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the arbitration shall be deemed to be the return day, and the applicant and respondents shall be deemed to be plaintiff and defendants respectively."

By rule 64, "Where any matter or thing is not specially provided for under these rules, the same procedure shall be followed and the same provisions shall apply, as far as practicable, as in a similar matter or thing under the County Courts Act, 1888, and the rules made in pursuance of that Act."

C. A. 1899

MOUNTAIN v. PARR.

A. L. Smith L.J.

ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act"; under that sub-section, if a weekly payment were adjudicated on by an arbitrator, and contrary to all expectation the workman got well, the arbitrator would have power to look into the matter again for the purpose of reviewing the amount of compensation payable. Again, from the 2nd schedule it is plain that the county court judge sits as an arbitrator only; the provisions of sub-s. 2 that, where the matter is not settled by a committee, it is to be settled by a single agreed arbitrator, or, in the absence of agreement, by the county court judge or by a single arbitrator appointed by him, are clear as to this. This view is strengthened by an examination of sub-s. 4, which provides that the Arbitration Act, 1889, is not to apply to an arbitration under this Act, but that an arbitrator may submit a question of law for the decision of the county court judge, whose decision on any question of law, either on such submission, "or in any case where he himself settles the matter under this Act," is to be final unless an appeal is brought to the Court of Appeal; the county court judge can only settle a matter under the Act as an arbitrator, and therefore this provision means that where the county court judge sits himself as arbitrator questions of law must, if his decision is not accepted, be remitted to the Court of Appeal. Then sub-s. 4 goes on to give the county court judge for the purpose of an arbitration under the Act the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court. It is perfectly clear upon a consideration of the Act and its schedules that the county court judge is to sit as an arbitrator, and arbitrator only.

Then the question arises, can an arbitrator grant a new trial? That question has only to be put in order to be answered; he clearly cannot do so. This has, however, been attempted in the present case; the appellant has tried unsuccessfully to get a new trial from the county court judge, and he now appeals from that decision to this Court. The argument for the appellant is based upon the Workmen's Compensation

Rules, 1898, and it is contended that rule 1 (4.), rule 24, and rule 64, when construed together bring in the whole of the County Court Rules, so that a county court judge sitting as an arbitrator is in the same position and has the same power as a county court judge who is sitting not as an arbitrator but in the exercise of his ordinary jurisdiction. That contention, if successful, would cut out of the Act all the special provisions in it which make the county court judge an arbitrator; this we cannot do, and the proper construction to place upon the rules which have been cited to us is that, so far as the County Court Rules apply to arbitrations, they are to apply to arbitrations under this Act; nowhere in the County Court Rules, however, is there one giving an arbitrator power to grant a new trial. I think, therefore, that the county court judge had no jurisdiction to grant a new trial, and that this appeal should be dismissed.

COLLINS L.J. I am of the same opinion. It is unnecessary for me to go through the various sections of the Act and the Rules after their exhaustive consideration at the hands of my Lord. It is clear that the Legislature has expressly enacted that when sitting under this Act a county court judge is to be an arbitrator only; any provisions in the rules which appear at first sight inconsistent with this view are easily made to conform to it when their object is carefully examined.

ROMER L.J. I agree. It is quite clear that where the rules under this Act provide that the County Court Rules are to apply, it can only mean that they are to apply with the necessary modifications, having regard to the fact that proceedings under the Act are proceedings in an arbitration, and not in a county court action.

Appeal dismissed.

Solicitors for appellant: *Bramall, White & Saunders, for Walker & Barker, Nottingham.*

Solicitors for respondent: *J. H. Lee & Watts, for Whittingham & Williams, Nottingham.*

W. J. B.

1898
Dec. 5.
1899
Jan. 23.

In re MASON.
Ex parte BING.

Bankruptcy—Proof—Loan to Firm on Terms of Sharing Profits—Subsequent Advances without express Stipulation as to Rate of Interest—Dissolution of Firm—Subsequent Agreement with continuing Partner to continue Loan at Fixed Rate of Interest—Postponement—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2, 3.

In 1893 A., B., and C. executed a deed by which A. and B. entered into partnership for a term of years, and C. agreed to lend them 1600*l.* as capital for the business, she to receive a share of the profits in lieu of interest. In June, 1895, A. and B. by deed, to which C. was a party, dissolved partnership, B. continuing the business and taking over and becoming solely responsible for the debt due to C., which at this date comprised the 1600*l.* and a further sum advanced by her without any express stipulation as to interest. In August, 1895, B. and C. entered into a deed by which it was agreed that C. should continue to receive a share of profits in lieu of interest in respect of the 1600*l.*, but that the further advance and any future advances should carry a fixed rate of interest. In 1896 B. became bankrupt, and C. claimed to prove in competition with the other creditors of the business in respect of all her advances :—

Held, that C. must be postponed in respect of all her advances prior to August, 1895.

This was an appeal against the rejection of a proof by the trustee in bankruptcy.

By deed dated October 2, 1893, and made between S. Bing (a widow) of the first part, T. Mason of the second part, and D. Bryan of the third part, T. Mason and D. Bryan entered into partnership as wholesale stationers for seven years from January 1, 1894 ; and S. Bing agreed to lend them capital up to 1600*l.*, to be employed in the said business, she receiving therefor in lieu of interest a sum equal to one-third of the net profits of the said business. The deed also provided that S. Bing might, at any time she so desired, become a partner in the business on equal terms as to the receipt of profits.

Under this deed S. Bing advanced the 1600*l.* to the partnership, and also further moneys by way of capital.

By deed dated June 1, 1895, and made between S. Bing of

the first part, T. Mason of the second part, and D. Bryan of the third part, and supplemental to the deed of October 2, 1893, T. Mason and D. Bryan dissolved their said partnership as from the then June 1. This deed also provided that T. Mason should carry on the business alone, that D. Bryan should take over and pay certain debts and liabilities of the partnership, and that T. Mason should take over and pay certain other debts and liabilities of the partnership, including the debt due to S. Bing.

By deed dated August 1, 1895, and made between S. Bing of the one part and T. Mason of the other part, and supplemental to the deed of October 2, 1893, and the deed of June 1, 1895 (thereinafter called the deed of dissolution), after reciting that at the date of the deed of dissolution, in addition to the sum of 1600*l.* mentioned in the partnership deed, there was due to S. Bing from the partnership (which was dissolved by the deed of dissolution) the sum of 2307*l.* 14*s.* 2*d.*, the whole of which sum still remained due to her, that by reason of the provisions of the deed of dissolution D. Bryan was freed from all liability to pay to S. Bing the two sums of 1600*l.* and 2307*l.* 14*s.* 2*d.*, and T. Mason was solely liable to pay the same; that T. Mason was then carrying on the business of a stationer, and S. Bing had advanced to him for the purposes of such business the further sum of 1120*l.*, and it was probable that she might thereafter advance further moneys to him for the same purposes; and that it had been agreed between S. Bing and T. Mason that the payment of the said several sums of 1600*l.*, 2307*l.* 14*s.* 2*d.*, and 1120*l.* and such further moneys as last aforesaid should be secured at the times and in manner thereinafter appearing; it was agreed (inter alia) as follows:—

"1. T. Mason will pay to S. Bing the sum of 1600*l.* on the 31st of December, 1895, and also will pay to her in lieu of interest thereon for each year during which he shall make any net profits in the said business such further sum as shall be equivalent to one moiety of all the net profits derived from the said business from its commencement on the 1st of June, 1895, such last-mentioned payment to be made on the 31st of December, 1895; and will also pay to her the sum of 1000*l.* (part of

1899

MASON, *In re.* BING, *Ex parte.*

the said sum of 2307*l.* 14*s.* 2*d.*) on or before the 31st of December, 1895, a further sum of 1000*l.* on or before the 30th of April, 1896, and the residue of the said sum of 2307*l.* 14*s.* 2*d.* and the said sum of 1120*l.* and all such further advances as aforesaid on or before the 30th of April, 1897, and until the said principal sums (other than the said sum of 1600*l.*) shall be repaid will pay to her interest thereon, or so much thereof respectively as shall remain owing, at the rate of 5*l.* per cent. per annum by quarterly payments on the usual quarter days in each year, the first of such payments to be made on the 29th of September, 1895."

In August, 1896, a receiving order was made against T. Mason, and adjudication followed.

At the date of the receiving order the three sums of 1600*l.*, 2307*l.* 14*s.* 2*d.*, and 1120*l.* were still due to S. Bing, and also further advances made after August 1, 1895, and amounting to 1195*l.* 4*s.* 4*d.* S. Bing carried in a proof against the estate of T. Mason for 6222*l.* 18*s.* 6*d.*, being the total amount of her said advances. The trustee rejected her proof on the ground that the money was advanced to the bankrupt by way of loan on a contract that she should receive a rate of interest varying with the profits of the business within ss. 2 and 3 of the Partnership Act, 1890. (1) S. Bing appealed.

(1) The Partnership Act, 1890, provides, s. 2, sub-s. 3: "The receipt by a person of a share of the profits of a business is primâ facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular: . . . .

"(*d*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such: Provided that the contract is in writing and signed by or on behalf of all the parties thereto."

Sect. 3: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . . being adjudged a bankrupt, ... the lender of the loan shall not be entitled to recover anything in respect of his loan . . . . until the claims of the other creditors of the borrower . . . . for valuable consideration in money or money's worth have been satisfied."

Reed, Q.C., and *Hansell*, for Mrs. Bing. It may be admitted that Mrs. Bing must be postponed as to the 1600*l.*; but she is entitled to prove for the 2300*l.* and the 1100*l.*, and other subsequent advances. The deed of dissolution of June 1, 1895, operated as a novation, and converted the then existing loans of 1600*l.* and 2300*l.* into a relending to and new debt by Mason. The 2300*l.* cannot be said to be lent "on a contract" at a rate of interest varying with the profits within the meaning of sub-s. 3 of s. 2 of the Partnership Act, 1890, because from June 1, 1895, Mason carried on the business alone, and there was no contract by him to pay interest at a rate varying with profits. Mrs. Bing's rights were fixed by the agreement of August 1, 1895, and it was competent for her to continue the 1600*l.* on the old basis, and to stipulate for the payment of the 2300*l.* and 1100*l.* and further advances at a fixed rate of interest: *In re Tew*. (1) Sect. 2 of the Partnership Act, 1890, being a disabling section, must be construed strictly, and s. 3 of the Act defines the extent of the disability. There is nothing between June 1 and August 1, 1895, to shew any contract between Mason and Mrs. Bing different from the written contract of August 1, which is the only contract to be considered for the purposes of the Act. The principle of *In re Grason* (2) does not apply.

Dickens, Q.C., and *Blackwell*, for the trustee. The only question is on what terms were these moneys lent before the deed of August 1, 1895. That deed does not affect the previous advances. Under the deed of October, 1893, the advances were to be made upon the terms of sharing in the profits. The deed of June, 1895, contains no recital or stipulation of any change in the manner of these loans; the only change is that Mason alone is substituted a debtor in the place of Mason & Bryan. The true inference from all the facts is that the loans continued on the same lines as before until the deed of August 1, 1895, which is an attempt to get out of the Act. The case is clearly within the principle of *In re Grason* (2), and the provisions of the Act cannot be defeated unless there was a repayment of the old debt, and an entirely new loan on new terms. If the loans

(1) (1873) L. R. 8 Ch. 569. (2) (1879) 12 Ch. D. 366.

1899

MASON, *In re.* BING, *Ex parte.*

prior to August 1, 1895, were advanced without an agreement as to profits, there would be a partnership between them. The trustee admits that Mrs. Bing is entitled to prove for advances made after August 1, 1895; but all advances prior to that date must be postponed.

Reed, Q.C., in reply. As to the question of partnership, a mere loan of money at interest does not create a partnership. It is a question of fact in each case. The deed of August 1 is the only contract that can postpone Mrs. Bing, and under that contract only 1600*l.* is postponed. The principle of *In re Tuff* (1) applies. The contract of June 1 is a contract to pay, not a contract of loan, and the onus is on the trustee to shew a contract to pay interest at a rate varying with profits.

[WRIGHT J. referred to *In re Fort.* (2)]

That case only decides that a parol contract may be within the meaning of the Act. There is no evidence here of any verbal agreement.

WRIGHT J. I think in this case that the contract of August 1, 1895, between Mason and Mrs. Bing is not the contract under which it ought to be held that the money was lent. To find out on what terms it was lent, you must go back to the previous transactions, because the contract of August 1, 1895, recognises something previously advanced, and it provides the way in which it should be paid. If you go back at all, the only thing is to go back either to the contract of October, 1893, or to the contract of June, 1895. But the contract of June, 1895, does not help us. It does not mention on what terms the money was to be advanced, or treat it as money then to be advanced at all; and, in point of fact, in June, 1895, 2307*l.* of it had already been advanced. It seems to me, therefore, that the contract of June, 1895, does not help us at all as to the terms on which the advance was made. It merely substitutes one debtor or partner, as the case may be, for two; and I do not think it can be said that such a novation as is found in the contract of June, 1895, amounts to a fresh lending of the money—a new debt. Now, what is the true inference from all

(1) (1887) 19 Q. B. D. 88. (2) [1897] 2 Q. B. 495.

the circumstances of the case, taking into consideration Mrs. Bing's own evidence, from which it is quite clear that she never had any distinct notion of what was going on or on what terms she was lending the money? I think the true inference is that, when she advanced the sums making up the 2300*l.* and 1100*l.*, she from time to time advanced those sums on the same basis as that on which she advanced the 1600*l.* She never thought about it. She thought she was to get a certain share of the profits; and I do not see any reason to think that, at any rate down to August, 1895, she ever had an idea of anything different. Therefore, she advanced it on a profit basis, and if she advanced it on a profit basis, primâ facie s. 3 of the Partnership Act, 1890, applies. No doubt the agreement between her and Mason was altered by the contract of August, 1895. But the mere fact that that stipulates for a different mode of being paid does not appear to have any legal effect in the way of constituting a repayment of the old loan and the advancing of a new loan. It seems to me in that respect the case of *In re Grason* (1) is in point. In that view it is unnecessary for me to consider whether the sums proved for are correct. If I took the alternative view, that the sums were not advanced on any contract at all, then it might be necessary to consider how far Mrs. Bing was thereby constituted a partner. But I do not think that is the right way to look at it. Then Mr. Reed says s. 3 of the Partnership Act cannot in its terms apply because here the money was lent to Mason & Bryan, and Mason & Bryan were not bankrupt. It is a very ingenious argument, but I think it is too great a refinement for me to follow it. The money was lent to a firm, and the person who now represents that firm has become bankrupt. I do not know quite in what way the section ought to have been expressed to deal with the present case; but I think that, without doing any violence to the language of the section, it may be said that where money has been lent to a firm, and the persons constituting that firm dissolve their partnership, and the loan is continued on the same terms to one of them, that that is within the section. I think it must be so. I feel the

(1) 12 Ch. D. 366.

1899

MASON, *In re.* BING, *Ex parte.*

Wright J.

difficulty of putting a construction on that section, not for the first time, but on the whole I think the proof ought to be postponed. Then, according to *In re Grason* (1), that amounts to a declaration that for the present the proof is to be rejected subject to any application to amend. There will be no order as to costs.

Solicitors for applicant: *Billings, Robbins & Busk.*
Solicitor for trustee: *S. Myers.*

H. L. F.

1899
March 7, 20.

BURROWS *v.* RHODES AND JAMESON.

False Representation—Right of Action—Person induced by Misrepresentation to Commit Crime—Foreign Enlistment Act, 1870 (33 & 34 *Vict. c.* 90), *s.* 11.

Where a person is induced by the fraudulent misrepresentation of another to do an act which, in consequence of such misrepresentation, he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act.

QUESTION of law raised by pleadings.

The statement of claim was as follows:—

1. The British South Africa Company is a British company, incorporated by Royal Charter dated October 29, 1889, for trading and other purposes, as in the said charter more particularly mentioned, with powers of government and other powers, as therein also mentioned, having for the principal field of its operations a region of South Africa in the said charter defined.

2. The defendant Rhodes was, at all times material to this action, a director of the said company, and was intrusted with the management of all its property and affairs in South Africa. The defendant Jameson was at all such times as aforesaid an officer and agent of the said company, and was intrusted with the control of the forces of the company which were employed in the invasion hereinafter mentioned.

3. In or about the month of September, 1894, the plaintiff was employed by the company to serve for a year in the armed forces of the company within the territorial limits prescribed

(1) 12 Ch. D. 366.

for the company by the said charter, and he entered upon and remained continuously in such employment from the time of his engagement as aforesaid until after the happening of the matters hereinafter complained of.

4. In the month of September, 1895 (when the plaintiff was at Buluwayo, and his period of service was about to expire), the defendants, having secretly determined to invade the territory of the South African Republic with a hostile armed force, in order to induce the plaintiff to renew his engagement and take part in such invasion as a member of the said force, fraudulently represented to the plaintiff that the detachment in which he was serving was about to be employed in active service, and that it would be to his benefit, and they requested him, to continue in the service of the said company. The defendants intended the plaintiff to believe, and he did believe, that the service on which the said detachment was about to be employed was of a lawful nature, and, relying upon the aforesaid representations, the plaintiff agreed to and did continue in the said company's service for a further period. The said representations were to the knowledge of the defendants untrue.

5. Shortly after the plaintiff had entered into the agreement in paragraph 4 hereof mentioned, the defendants caused a considerable number of the troops in the employment of the said company (including the detachment in which the plaintiff was serving) to be concentrated at or near Pitsani, under the control of the defendant Jameson, for the purpose of the said invasion.

6. On December 29, 1895, the defendants, for the purpose of the said invasion, and in order to induce the plaintiff to take part therein, and to enter the territory of the said Republic as a member of the said company's armed forces, fraudulently represented to the plaintiff that fighting was about to commence in or near Johannesburg, that protection was needed for the women and children there, that a body of the Rhodesian Horse would meet to co-operate within the territory of the said Republic with the troops with which the plaintiff was serving, that a body of Cape Mounted Rifles (forces of Her Majesty) was also waiting near the frontier of the said Republic to join and co-operate with the said troops, and that the proposed

1899

BURROWS v. RHODES.

invasion had the sanction and support of Her Majesty's Government. The representations in this paragraph mentioned were to the knowledge of the defendants untrue.

7. The plaintiff, believing the aforesaid representations to be true, and relying thereupon, was induced thereby to enter the territory of the South African Republic as a member of the said company's armed forces, and to engage in hostilities with the troops of the said Republic.

8. By reason of the matters aforesaid the plaintiff suffered great injury, and was subjected to severe hardship and imminent dangers. The troops of the said company with which the plaintiff was serving as aforesaid were defeated by the forces of the said Republic at Doornkop, and in the battle which was fought there the plaintiff was severely wounded and lost a leg, and subsequently had to undergo seven surgical operations. He was taken and kept prisoner by the authorities of the said Republic, and was liable to summary execution at their hands. Hospital accommodation was refused him, and he was left lying exposed in the street at Pretoria. He was also rendered liable to severe punishment in England for offences against the laws of England, and was brought to England as a prisoner. He was caused much pain and suffering, and his health and capacity for earning his livelihood were, and still are and always will be, greatly impaired.

Particulars of special damage.

	£	s.	d.
1. Loss of kit	25	0	0
2. Loss of pay for first eight months of 1896 at 15*l.* a month (rations were provided) . . .	120	0	0
3. Loss of earnings from September 1, 1896, to November 1, 1898, at 200*l.* a year . .	433	6	8
4. Loss of leg.			

The plaintiff claims 3000*l.*

By paragraph 11 of the statement of defence:—

"The defendants will submit that the statement of claim discloses no cause of action."

It was ordered by consent that the question of law raised by paragraph 11 of the statement of defence be set down for hearing forthwith, and that, pending such hearing, all further proceedings be stayed.

Cohen, Q.C. (*Lord Robert Cecil* with him), for the defendants. Assuming for the purposes of the argument that the facts stated in the statement of claim are true, the plaintiff has no cause of action. By s. 11 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), fitting out a military expedition against a friendly State—which, for the purposes of this argument, the defendants admittedly did—is an offence against the Act. The plaintiff being engaged in the same expedition was also guilty of an offence against the Act. He and they were, therefore, equally guilty, and he has no right of action. If a person is induced by false representations to commit a criminal offence, believing that what he is doing is legal, he has no remedy for the misrepresentation against those who have so induced him, and who are also guilty of the commission of the offence. The statement of claim does not aver that the plaintiff believed that what he did was legal. The main question, however, is whether a person who has committed a criminal offence can under any circumstances obtain damages from any one for the consequences of that offence. In *Holman* v. *Johnson* (1) Lord Mansfield said: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy. . . . The principle of public policy is this, ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." In *Scott* v. *Brown* (2) Lindley L.J. said (3): "If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him," and cited Lord Mansfield's dictum in *Holman* v. *Johnson* (1); and A. L. Smith L.J. said (4): "If a plaintiff cannot maintain his cause

(1) (1775) 1 Cowp. 341.
(2) [1892] 2 Q. B. 724.
(3) [1892] 2 Q. B. at p. 728.
(4) [1892] 2 Q. B. at p. 734.

1899

BURROWS v. RHODES.

of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action." That is precisely the case here. The foundation of the plaintiff's claim is that there was an illegal expedition in which he took part. That is to say, he bases his claim on the commission of an act declared by law to be criminal. In *Colburn* v. *Patmore* (1) Lord Lyndhurst C.B. said (2): "I know of no case in which a person who has committed an act declared by law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."

The rule that there is no contribution among joint tortfeasors was settled by *Merryweather* v. *Nixan* (3); but that rule does not apply to the present case, where the question is whether a person who has committed a criminal offence can be allowed to recover damages for any injury he has sustained in consequence of the commission of that offence.

Lawson Walton, Q.C. (*Barnard Lailey* with him), for the plaintiff. It cannot be admitted that the plaintiff was guilty of an offence against the Foreign Enlistment Act, 1870. He had no mens rea in what he did, and a mens rea is an essential element for an offence under that Act. It is essential to every criminal offence except an extremely special and limited class of offences which are the creation of particular statutes. If, therefore, there was no violation of the Foreign Enlistment Act by the plaintiff, he was not a particeps criminis with the defendants, and the question does not arise. But if the plaintiff was guilty of an offence against the Foreign Enlistment Act, there is no authority for saying that a person who has been fraudulently induced to violate the provisions of a penal statute has no remedy for the misrepresentation. The dictum of Lord Lyndhurst in *Colburn* v. *Patmore* (1) was obiter and cannot be upheld. Why should a man be able to recover if the act which he is fraudulently induced to do is a civil wrong but not if it is a crime? On what principle is such a distinction drawn? As Best C.J. points out in *Adamson* v. *Jarvis* (4), the rule that

(1) (1834) 1 C. M. & R. 73.
(2) 1 C. M. & R. 83.
(3) (1799) 8 T. R. 186.
(4) (1827) 4 Bing. 66, at p. 73.

wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act; and in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (1), the House of Lords said that *Merryweather* v. *Nixan* (2) was not founded on any principle of equity and ought not to be extended. No doubt where a remedy is sought to be enforced for damage arising either from a breach of contract or from a tort, the Court will not aid in a case where both parties were engaged in conduct which they knew or must be taken to have known to be wrongful. That is not the case here. The plaintiff did not know, and could not know, that what he did was wrongful. [He cited *Campbell* v. *Campbell.* (3)]

Cohen, Q.C., replied.

Cur. adv. vult.

March 20. The following judgment was read by

GRANTHAM J. In this case we are asked to determine whether on the statement of claim as presented to us (or with such amendments, if any, as may be necessary to raise the question of law desired to be determined) any cause of action has been shewn for which an action is maintainable according to English law.

For the purposes of our judgment, this being a demurrer by the defendants, all the facts alleged in the claim must be taken to be true and admitted by the defendants. What, therefore, are those facts? Shortly these. That the defendants having secretly determined to invade the territory of a friendly Power with a hostile armed force, they, for the purpose of inducing the plaintiff to enter their service as an armed servant, deceived the plaintiff as to their intentions, told him that the service on which they wished to employ him was lawful, that as fighting would shortly take place in the said South African Republic between other forces his services were required for the protection of women and children, that the force of which he was

(1) [1894] A. C. 318. (2) 8 T. R. 186.
(3) (1840) 7 Cl. & F. 166.

1899

BURROWS v. RHODES.

Grantham J.

a member would have the support of other lawfully appointed forces, and that such invasion of the territory of the South African Republic had the sanction and support of Her Majesty's Government; whereas in fact all the aforesaid representations were untrue to the knowledge of the defendants. Acting on and believing in these statements, the plaintiff entered the service of the defendants, and in obeying their orders received the injuries and suffered the losses complained of, and for which he seeks to recover damages in this action.

It is difficult to realize any period of our history in which a defendant making such fraudulent statements and inflicting such serious injury would not be liable for the consequences of his fraud, and yet it has been solemnly argued that such is the law at the present time.

Let us see, therefore, on what grounds the learned counsel attempts to support his contention that this statement of claim discloses no good cause of action. He does not rely on a possible assumption that the damages resulted from the voluntary enlistment of the plaintiff on a warlike expedition for the pay and the prospective advantages likely to accrue to him, and were not in any way caused or aggravated by the fraud, but he admits that his contention rests solely on the assumption that the plaintiff, innocent of all knowledge of wrong on his part, did, by obeying the orders of the defendants, in fact become a criminal himself, and could not therefore complain of any wrong done him by the defendants who were participes criminis with him. But how does he shew that he is a criminal? He relies on the Foreign Enlistment Act, 1870, s. 11: "If any person within the limits of Her Majesty's dominions and without the licence of Her Majesty prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State the following consequences shall ensue: Every person engaged in such preparation or fitting out or assisting therein or employed in any capacity in such expedition shall be guilty of an offence against this Act and shall be punishable" accordingly.

The defendants contend, therefore, that, it being immaterial whether the person employed in such expedition had a mens

rea or guilty knowledge of the nature of his act or not, and though believing as the plaintiff did that his action had the sanction of the Queen's Government, yet he was just as much a criminal as the defendants who had knowingly broken the law, and, once prove that the plaintiff was a criminal, he could not, according to the defendants, be heard to complain of the original and deeper-dyed fraud of the defendants which had placed the plaintiff unwittingly on his part in a position which made him liable to be called a criminal.

A grosser perversion of English justice it is impossible to imagine, and I should indeed be sorry if, under any circumstances, it could be proved to be English law.

It must not be forgotten that the plaintiff has not been proved to be a criminal in any court of law. He has not been tried, much less convicted, and never will be tried, and therefore cannot be convicted; and under these circumstances a jury would, I doubt not, acquit him if he was now tried; but till he has been convicted, how can the defendants be heard to say that as in their opinion the plaintiff's conduct was an infringement of the Act, he must be treated as if he had been convicted of being a criminal by Act of Parliament?

Let us look, therefore, at the authorities relied upon by the learned counsel on behalf of the defendants to see what aid (if any) they give him in his contention.

First he relies on the dictum of Lord Mansfield in *Holman* v. *Johnson* (1), where he says: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed. . . . . No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causâ . . . . there the Court says he has no right to be assisted. . . . . So if the plaintiff and defendant were to change sides . . . . the latter would have the advantage of it, for where both are *equally* in fault potior est conditio defendentis." It seems to me that no stronger authority could

(1) 1 Cowp. 341, at p. 343.

1899

BURROWS v. RHODES.

Grantham J.

be quoted against the defendants. The plaintiff's cause of action is not founded, as far as he is concerned, on any immoral or illegal consideration; but as the defendants rely on their own immorality and illegality, it does sound very ill in their mouths to endeavour to rob the plaintiff of his rights by their (the defendants') illegality; and as in these proceedings the defendants have changed places with the plaintiff and are practically plaintiffs (as they are claiming a judgment on their demurrer), I am only re-echoing Lord Mansfield's words in saying, I will not allow the plaintiffs to rely on their illegality to obtain a judgment against the defendant, for potior est conditio defendentis, and, the demurrer being dismissed, the present plaintiff's right of action is admitted.

The next case relied on was *Colburn* v. *Patmore*. (1) This case when it is carefully examined seems to me to help the defendants less even than the last. The only matter under discussion in that case was whether the plaintiff, the owner of a paper, having been convicted of a criminal libel and fined 100*l*., could recover that sum from the defendant, the editor of the paper, who he alleged inserted it contrary to his duty to the plaintiff and so induced the plaintiff to publish it. It was held that he could not recover because he had not shewn that he had not himself approved of the libel before publishing it. Let us assume that the obiter dicta of Lord Lyndhurst in that case are law, where he says (2): "I know of no case in which a person who has committed an act declared by the law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." Quite true; but what compensation is it that he cannot recover? Why, compensation for the damages he has incurred by proceedings having been taken against him for the commission by him of the wrongful act complained of. As was said during the argument, "The main question is whether a person convicted of a criminal offence can claim indemnity from another who has participated with him in the commission of that offence," i.e., indemnity for the damages recovered against him for the

(1) 1 C. M. & R. 73. (2) 1 C. M. & R. at p. 83.

commission of the offence. In this case the plaintiff in the first place has been convicted of no offence, and in the second place is not seeking to recover an indemnity for damages recovered against him, but is seeking to recover damages for a wrong done to him and in which he did not participate except as a sufferer, and in which it cannot be said that he was a particeps criminis. When the false and fraudulent representation was made which was the causa causans of this action no crime had been committed by the defendants, much less by the plaintiff, and, as far as the plaintiff knew, no crime had been committed by the defendants at any time up to the happening of the events which caused the damage to the plaintiff, for if the invasion had the authority and sanction of Her Majesty or Her Majesty's Government, as the defendants alleged, there was no breach of any statute for which the plaintiff or the defendants could be made liable.

Reliance was next placed on the case of *Merryweather* v. *Nixan* (1), in which it was held that one wrongdoer cannot have redress or contribution against another. True it was so held; but what does Best C.J. say about it in delivering the judgment of the Court in *Adamson* v. *Jarvis*? (2) He says (3): "From the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan* (1), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Again, in the case of *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (4), the noble Lords though not overruling *Merryweather* v. *Nixan* (1), damn the case with faint praise, decline in terms to apply it to Scotland, and refuse to extend its operation one iota. While as the action of the plaintiff is only made a criminal act by statute, and is not inherently a criminal act, the plaintiff cannot be presumed to have known of his guilt until he has been proved to have been guilty. As the expedition in question is alleged to have been something in the nature of a highway robbery, I

(1) 8 T. R. 18 6.
(2) 4 Bing. 66.
(3) 4 Bing. at p. 72.
(4) [1894] A. C. 318.

1899

BURROWS v. RHODES.

Grantham J.

am surprised that the defendants did not refer to the case of *Everet* v. *Williams* (1), mentioned in Lindley on Partnership, 6th ed. 101, which it was said was a suit by one highwayman against another for an account of their plunder, the bill alleging that the plaintiff was engaged in dealing in several commodities, such as plate, rings, watches, &c., and that the defendant applied to him to become a partner, and that after dealing together at several places such as Bagshot, Salisbury, Hampstead, &c., they differed as to their respective shares, and so a test suit in Chancery was commenced for an account. The bill was dismissed with costs, because it was held that they were both participes criminis, and so that the plaintiff could not recover. Perhaps it may be that the learned counsel were afraid to refer us to this case lest the same results should happen, namely, that the counsel who signed the bill was made to pay the costs of the bill, and the solicitors were fined 50*l*., and the plaintiff and defendant were both hanged.

As the defendants have failed to establish their case, it is hardly necessary to refer to any authority on the other side, and I will only mention *Campbell* v. *Campbell* (2), where one partner in a distillery had been convicted of illegal transactions and made liable to penalties; he was held entitled to recover against his co-partner contribution for those penalties notwithstanding the authority of *Colburn* v. *Patmore* (3) before referred to, because, as Lord Cottenham said, he was not particeps criminis in the sense which would disentitle him to sue for contribution. If in such a case he could recover, how much more so when the cause of action is not for indemnity for damages given against him for the commission of the alleged illegal act, but is for damages for the alleged fraud on the part of the defendants in putting the plaintiff into such a position as caused him personal injury and loss quite irrespective of any alleged complicity in a crime?

It is true the plaintiff also refers in his statement of claim

(1) 2 Pothier on Obligations, by Evans, p. 3, note, citing Europ. Mag. 1737, vol. ii. p. 360; and see the orders of the Court corrected from the originals in the Record Office in Law Quart. Rev. ix. 197.

(2) 7 Cl. & F. 166.

(3) 1 C. M. & R. 73.

to the liability the defendants had made him incur to severe punishment in England for offences against the English law; but he never was made liable to punishment, he never was made a criminal, and he suffered no damage from that liability; and I therefore treat that part of the statement of claim as struck out, as no damages are really claimed under that head.

As the defendants have entirely failed to refer us to any authority that in my judgment justifies their contention that the plaintiff's declaration discloses no good cause of action for which he can sue, I am glad to be able to say that our law has been purged from the suggestion that fraud and false representation injurious to an innocent person can be committed with impunity if the injured person has by such fraud and false representation been unwittingly and innocently made to commit what the law has said shall be called a crime. For these reasons, in my judgment, the demurrer must be dismissed with costs.

The following judgment was read by

KENNEDY J. The plaintiff in this action seeks to recover damages from the defendants on the ground that they induced him by false and fraudulent representations to renew an engagement of service with the British South Africa Company, and to take part in the well-known expedition which was led by the defendant Jameson into the Transvaal in December, 1895, in consequence whereof he was damnified in various ways which are set forth in the statement of claim.

In paragraph 8 of the statement of claim the plaintiff alleges, amongst other things, that by reason of the premises he was rendered liable to severe punishment in England for offences against the laws of England. The defendants, in paragraph 11 of the statement of defence, have pleaded that the statement of claim discloses no cause of action, their point being that the allegation of paragraph 8, which I have just quoted, puts the plaintiff out of court. It is an admission that the plaintiff's participation in the expedition constituted a criminal offence under s. 11 of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), and the defendants' argument is that no action can be

1899

BURROWS v. RHODES.

Kennedy J.

maintained to recover damages for having been induced to commit a crime. It is upon the correctness of this contention that the Court is called upon to adjudicate, as if the point had been raised by a demurrer under the old common law practice.

I have come to the conclusion, for reasons which I will state, that the defendants' contention ought not to prevail.

It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. In *Shackell* v. *Rosier* (1), where, in consideration that the plaintiff had published a libel at the defendant's request, and had at the like request consented to defend an action brought against the plaintiff for such publication, the defendant promised to indemnify the plaintiff from the costs of the action, the Court of Common Pleas held that the promise could not be enforced. In the preceding year, in the American case of *Arnold* v. *Clifford* (2), Story J. held that a promise to indemnify another for doing a private wrong or for committing a public crime is against public policy and is void in law (see also *Martyn* v. *Blithman* (3), which is cited in the note to *Farebrother* v. *Ansley*. (4))

Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear.

In the next place, it is, I think, also clear that an action for indemnity, grounded either on deceit or warranty, may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorized or (as is alleged in this action) fraudulently induced by another to do an act indifferent in itself, which has turned out, because it constitutes a private wrong, to be unlawful, but which was

(1) (1836) 2 Bing. N. C. 634.
(2) (1835) 2 Sumner's Circuit Court Reports, United States, 238.
(3) (1611) Yelv. 197.
(4) (1808) 1 Camp. 343, at p. 348.

not at the time apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness. (See the judgment of Best C.J. in *Adamson* v. *Jarvis* (1); *Betts* v. *Gibbins* (2); *Dixon* v. *Fawcus* (3); Pollock on the Law of Torts, 5th ed. p. 171.) In such a case an express promise to indemnify is valid in law: *Fletcher* v. *Harcot*. (4)

I come now to the question which was very fully argued before us in the present case, namely, Does this right of indemnity, which exists in the case of a private wrong done by misadventure, exist also in any case in which the wrong is a criminal offence?

The defendants contend that it does not. They say that in no case whatever where the act done constitutes a criminal offence can the doer of it have a right of indemnity against any of the consequences of the act. It appears to me that this proposition of the defendants is wider and more general than the law warrants.

Certainly there is no right of indemnity where the doer of the act which another has authorized or induced knows it at the time to be a criminal offence. If, in a case in which knowledge is an essential ingredient of the offence, the plaintiff, in his claim for an indemnity, admitted that he was guilty of the offence, his claim would be on the face of it bad. If, in the like case, he was, on the trial of his claim for indemnity, proved to have been convicted of the offence, judgment must be given against him. Nor, in my judgment, can there be any valid claim to indemnity where the doer of the act which constitutes the offence has done it with knowledge of all the circumstances necessary to constitute the act an offence, but in ignorance that the act done under those circumstances constituted an offence. A man is presumed to know the law.

Thirdly, although it is not necessary to decide the point, I am inclined to think that there could be no valid claim to indemnity for being authorized or induced to do an act where the act which is in fact criminal is done in ignorance of the existence of some circumstance which is necessary to make it

(1) 4 Bing. 66.
(2) (1834) 2 A. & E. 57.
(3) (1861) 30 L. J. (Q.B.) 137.
(4) (1623) Hutton, 55.

1899

BURROWS v. RHODES.

Kennedy J.

a crime, or even is done in a belief that such circumstance does not exist, but where it is known that the act is morally a wrong act. In such a case the doer of the act has, it may be said, the mens rea in the sense attributed to that expression by Bramwell B. in the well-known case of *Reg.* v. *Prince* (1), and referred to by Wills J. in *Reg.* v. *Tolson.* (2) Such a case might, I think, occur, although it is not likely to occur often.

But I am unable to accept the defendants' proposition, where the act, though a criminal offence—malum prohibitum—is, upon the state of facts which the doer by the fraudulent misrepresentation of the person against whom he claims indemnity has been induced to believe to be the true state of facts, neither criminal nor immoral. Take the present case as an example. For the purposes of the argument of the point before us, the facts must be assumed to be as the plaintiff alleges them to be. It must, therefore, be assumed that he was rendered liable to be convicted of an offence under s. 11 of the Foreign Enlistment Act, 1870. It must also be assumed (in regard to the construction of that section) that a man may be convicted of an offence under that section if he assists or is employed in such an expedition as the expedition in question, although he can prove that he was induced to do what he did by a fraudulent misrepresentation that a portion of Her Majesty's regular forces was waiting near the frontier of the South African Republic to join and co-operate, and that the proposed invasion had the sanction and support of Her Majesty's Government—a statement of facts from which any one, I should think, would naturally and reasonably infer, and would believe that it was meant that he should infer, that the licence of Her Majesty, which would legalise the expedition, had been granted. It appears to me that a representation that the expedition had the "sanction" of Her Majesty's Government necessarily involves a representation that the "sanction" had been given in the way in which, by this section of the Act of Parliament, it could properly be given, namely, with the licence of Her Majesty.

(1) (1875) L. R. 2 C. C. 154, at p. 173.

(2) (1889) 23 Q. B. D. 168, at p. 180.

The learned counsel for the defendants contends that even in such a case a claim for indemnity, or indeed any claim for damages arising out of the matter which constitutes the offence, is on grounds of public policy legally inadmissible. Speaking for myself, I can see no ground of public policy upon which redress for consequent damage should be refused to the person so led to commit an offence by the false and fraudulent representations of fact which, in this case, as I understand their import, justified the doer in believing that he was acting in accordance with the law.

It appears to me that if the defendants' reasoning on this point were adopted a real injustice might result. Two illustrations, drawn from cases which present simpler features than are presented by this case, have occurred to me: the one, the case of an offence which is dealt with in courts of summary jurisdiction; the other, an offence which is matter of indictment. The Licensing Act, 1872, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. It was held in *Cundy* v. *Lecocq* (1) that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. Suppose A. by a fraudulent representation of the sobriety of B., who gives no indication of intoxication, but whom A. knows to be drunken, authorizes and induces a licensed victualler, who has no reason to disbelieve and does honestly believe the truth of the representation, to sell drink to B., and the licensed victualler is convicted and fined, upon what consideration of public policy should a man who, if the representation as to sobriety had been true would have committed no offence either against law or morals, be debarred from redress against the man who had by fraud inflicted upon him what might be a very serious injury? Or, to take a case under the 8 & 9 Vict. c. 100, s. 44. A person who receives two or more lunatics into his house, not being a registered asylum or hospital or a house duly licensed under that Act, or any previous Act, commits an indictable offence, and in *Reg.* v. *Bishop* (2) it was held by the Court for Crown Cases Reserved that it afforded no defence to

(1) (1884) 13 Q. B. D. 207. (2) (1880) 5 Q. B. D. 259.

1899

BURROWS v. RHODES.

Kennedy J.

prove, as was proved in that case, that the defendant honestly and on reasonable grounds believed that the persons whom he received were not lunatic. Suppose in such a case that the belief had been induced by a false and fraudulent misrepresentation on the part of the person who requested and authorized the proprietor of the house to receive the persons into his care; I am unable to see upon what ground of public policy or principle of justice the proprietor who has been led into the commission of the offence by the fraud of another, and who is free from any imputation of moral wrongdoing, should be denied a right of suing for damages the person whose successful fraud has caused him to do that which the law, in its care for the health and safety of lunatics, has made an offence. I may add, upon the question of public policy, that (as I think was stated by counsel in the course of the argument) there is express provision in the Sale of Food and Drugs Act, 1875, s. 28, for the right of a person convicted under the Act to recover the amount of any penalty in which he may have been convicted under the Act, together with the costs which have been paid or incurred by him in defending himself, from the person who sold him the adulterated article.

If we turn from the consideration of principle to look for authority, it appeared to be agreed by the learned counsel who argued the case before us that there is no decision which can be invoked as an authority upon the point under consideration. Mr. Cohen, however, cited a passage from the judgment of Lord Mansfield in *Holman* v. *Johnson* (1) in favour of the defendants which does not in my judgment appear to have any real bearing upon the question which we are considering; but he relied principally upon the opinion which was expressed by Lord Lyndhurst C.B., and in which Bolland, Alderson, and Gurney BB. concurred, in *Colburn* v. *Patmore*. (2) It is quoted and criticised in the notes to *Lampleigh* v. *Brathwait*, in the 3rd, 4th, 5th, 6th, and 7th editions of Smith's Leading Cases. It does not appear to me to help the defendants in the present case. The facts shortly were that the plaintiff, the proprietor of a journal, had been prosecuted, convicted, and fined for

(1) 1 Cowp. 341. (2) 4 Tyrw. 677; 1 C. M. & R. 73.

falsely and maliciously printing and publishing a libel in his journal. He thereupon sued the editor for inserting the libel in the journal falsely, maliciously, and negligently, and without his authority or consent, and he claimed to recover damages, which included the amount of the fine and the expenses to which he had been put in defending himself. The decision of the Court, which was adverse to the plaintiff, was given upon a point of pleading; but there was a very full discussion in the course of the argument as to the right of the plaintiff, having been himself convicted and fined for the libel, to sue the editor for indemnity. The members of the Court expressed in the course of their judgments a strong opinion that he had no such right. Lord Lyndhurst said, in the passage upon which the present defendants rely: "I am not aware of any case in which a man duly convicted of an act declared by law to be criminal" (in the report in Crompton, Meeson, and Roscoe the words are, "who has committed an act declared by the law to be criminal") "and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence in order to procure indemnity for the damages occasioned by that conviction; but after hearing the argument I entertain little or no doubt that such an action could not be maintained." It appears to me that the facts in *Colburn* v. *Patmore* (1), or in such analogous cases as Lord Lyndhurst evidently intended to refer to when he pronounced this opinion, and the facts as pleaded in the present case, give rise to very different considerations. The plaintiff in *Colburn* v. *Patmore* (1) could not after his conviction be heard to say that he did not falsely and maliciously publish the libel. As it was put by Alderson B. in the course of the argument, the plaintiff though actually ignorant was legally cognizant of the publication of the libel. As I have already pointed out, it can never, in my judgment, be successfully contended that a claim for indemnity can be maintained where the doer of the act knew at the time, or must be presumed to know, of circumstances which make the act either a private wrong or a public crime. Here the gist of the case is

(1) 4 Tyrw. 677; 1 C. M. & R. 73.

1899

BURROWS v. RHODES.

Kennedy J.

that the plaintiff did not know the facts which made his conduct criminal, but, on the contrary, was led by the defendants to believe, and did believe, in the existence of a fact—the sanction of the British Government—which, if it had been given, as he had a right (upon the defendants' representation) to assume it had been given, in the proper way, namely, under the licence of Her Majesty, would have been an answer to any imputation of illegality.

Further, whilst I have felt it to be my duty, after having had the valuable assistance of the full and careful arguments addressed to us, to deal with the case as if the plaintiff had been convicted and was claiming an indemnity for the penal consequences of the commission of a criminal offence, it should, I think, be borne in mind that in fact the plaintiff here has not been convicted, and is claiming under various heads damages which are unconnected with the possibility of conviction or punishment. The claim nearest in character to an indemnity for damages consequent upon the conduct of the defendants as inducing the commission of a crime, is contained in the allegation that he was brought to England as a prisoner. Whether any of these other heads of damage are so proximately connected with the alleged tortious conduct of the defendants as to be legally recoverable, we have not now to consider. That is a matter which, like the act itself, the plaintiff will have to prove at the trial. It may be that some of these claims of damages might be legally maintained, even if a claim for indemnity against the penal consequences of the commission of an offence could not. I prefer, however, to base my judgment for the plaintiff in regard to the question before the Court upon the broader grounds which I have stated.

Judgment for the plaintiff.

Solicitor for plaintiff: *G. B. Crook.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

A. P. P. K.

1 Q. B. 835.
Considered. HOUSE PROPERTY AND INVESTMENT COMPANY LIMITED *v.* JAMES WALKER, GOLDSMITH AND SILVERSMITH, LIMITED
[1948] 1 K. B. 257

[IN THE COURT OF APPEAL.]

C. A.
1899
March 24.

EASTERN TELEGRAPH COMPANY, LIMITED *v.* DENT AND OTHERS.

Landlord and Tenant—Lease—Breach of Covenant—Right of Re-entry—Covenant not to Sub-let without Landlord's Consent—Mistake—Forgetfulness—Equitable Relief against Forfeiture.

In a lease for years the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to re-enter upon breach of any of the covenants. The lessees, without asking for the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, and to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant:—

Held, that the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, and that the plaintiffs were entitled to succeed in the action.

Barrow v. *Isaacs*, [1891] 1 Q. B. 417, followed.

Hyde v. *Warden*, (1877) 3 Ex. D. 72, questioned.

APPEAL from a judgment of Kennedy J. at the trial without a jury.

The action was brought to recover possession of certain offices, forming part of 11, Old Broad Street, let by the plaintiffs to the defendants. The lease, which commenced in March, 1889, and was for a term of thirty-seven years, contained a covenant by the defendants "not to underlet, assign, or part with the possession of the rooms or offices and premises, or any part thereof, to any person or persons without the consent in writing of the company (the plaintiffs) for that purpose first obtained, such consent not to be unreasonably withheld," and there was a proviso for re-entry upon breach of any of the covenants. The claim of the plaintiffs was based on a breach of the covenant not to sub-let. Shortly after the commencement of the lease the defendants, with the consent of the

C. A. 1899

EASTERN TELEGRAPH COMPANY v. DENT.

plaintiffs, sub-let a room to a tobacco company. In 1898 this room was divided into two parts by a partition. One part continued in the same occupation, but the other part, which adjoined offices rented from the plaintiffs by Messrs. Burn & Berridge, was connected with their offices by a door, and was let to them by the defendants without the consent of the plaintiffs having been asked for. Messrs. Burn & Berridge went into possession, but, on the plaintiffs pointing out that no consent to the sub-letting had been asked for or obtained, the agreement to sub-let was cancelled. The learned judge held that there had been a sub-letting; that Messrs. Burn & Berridge were desirable tenants; and that the plaintiffs could not have reasonably withheld consent to the sub-letting; but he further held, on the authority of *Barrow* v. *Isaacs* (1), that the plaintiffs had a right of re-entry, and that he could not give equitable relief against the forfeiture. He therefore gave judgment for the plaintiffs.

The defendants appealed.

Dickens, Q.C., and *Muir Mackenzie*, for the defendants. There are two points—whether there has been a breach of covenant, and whether, if so, the defendants are entitled to equitable relief. Under circumstances such as those in this case an assignment is good where the lessor unreasonably withholds consent: *Treloar* v. *Bigge* (2); *Bates* v. *Donaldson*. (3) The covenant does not require that an application should be made in a case in which it would be unreasonable for the lessors to withhold consent, and the underletting in this case was not a breach of the covenant for which the plaintiffs can re-enter: *Hyde* v. *Warden* (4); *Burford* v. *Unwin*. (5) The case of *Barrow* v. *Isaacs* (1) is against this contention, but in that case *Hyde* v. *Warden* (4) does not appear in the list of cases cited in argument. Both are decisions of the Court of Appeal, and it is submitted that the last-named case should be supported.

(1) [1891] 1 Q. B. 417.
(2) (1874) L. R. 9 Ex. 151.
(3) [1896] 2 Q. B. 241.
(4) 3 Ex. D. 72.
(5) (1885) 1 Cab. & E. 494.

If there has been a breach of covenant for which the plaintiffs can re-enter, equity would grant relief. The view of Lord Esher M.R. in *Barrow* v. *Isaacs* (1), that forgetfulness was not a ground for relief, was not apparently adopted by Kay L.J. Further, in the present case the defendants had obtained the consent of the respondents to sub-let to the tobacco company, and Messrs. Burn & Berridge were already tenants of the plaintiffs, so that the defendants might well come to the conclusion that an application to the plaintiffs would be merely formal, and therefore unnecessary. There was, under the circumstances, a mistake, and equity would relieve the defendants from the forfeiture.

Bray, Q.C., and *Roskill*, for the plaintiffs, were not called on.

A. L. SMITH L.J. This is an appeal from a judgment of Kennedy J., and no one can read his judgment without seeing that he was averse from giving the decision that he felt compelled to give. I may say that if I saw my way to giving relief according to law I would gladly do so.

The case is that, under a lease, in 1889 the defendants took certain premises of the plaintiffs for a term of which a good many years have yet to run. The lease contained a covenant by the defendants against underletting without the consent of the plaintiffs. This was an express bargain between the parties, which undoubtedly was inserted for some purpose. In January, 1898, the defendants underlet a part of the premises to Messrs. Burn & Berridge. No possible objection could have been taken to that firm as tenants had the consent of the plaintiffs been asked. It was not asked—why, I do not know; and the plaintiffs claim to be entitled to re-enter under the terms of the lease. The covenant is clear and unambiguous to the effect that the defendants are not to underlet without consent, such consent not to be unreasonably withheld. It was sought to work the case of *Treloar* v. *Bigge* (2), which was a case in which the lessee asked the lessor to consent to an underletting and the consent was unreasonably withheld. But all that case decided was that on

(1) [1891] 1 Q. B. 417. (2) L. R. 9 Ex. 151.

C. A. 1899

EASTERN TELEGRAPH COMPANY v. DENT.

A. L. Smith L.J.

those facts the tenant might assign without consent. Then came the case of *Hyde* v. *Warden* (1), where Amphlett L.J., who wrote the judgment of the Court, said that the stipulation was that consent should not be withheld from an assignment or underlease to a respectable and responsible person, that no imputation had been made against the defendant, and consequently an attempt to eject him on the ground of want of consent would fail. If this judgment is in conflict with the subsequent case of *Barrow* v. *Isaacs* (2), I certainly agree with the decision in the last-named case. It covers the case now before us; and apart from it I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect. In *Burford* v. *Unwin* (3) Huddleston B. expressed an opinion adverse to the judgment in *Hyde* v. *Warden* (1) by which he was bound. This view was expressed six years before the decision in *Barrow* v. *Isaacs*. (2)

Treating the covenant as a binding contract, a court of equity would certainly not give relief against a breach of an express bargain between landlord and tenant. As to this, I should follow what Lord Esher M.R. said in *Barrow* v. *Isaacs* (2), that a tenant having committed a breach of a covenant through forgetfulness cannot go to equity and ask to be relieved on the ground of mistake. The appeal must be dismissed.

COLLINS L.J. I am of the same opinion. Hard cases must not be allowed to make bad law. The only difficulty in the case, to my mind, arose from a passage in the judgment in *Hyde* v. *Warden* (1), to which reference has been made. It is a remarkable thing that it was Amphlett L.J. who prepared that judgment, and the same learned judge delivered one of the judgments in *Treloar* v. *Bigge*. (4) If the true view of the former case is that it is a decision that in case of assignment without consent, where such consent is stipulated for, there is no breach of covenant where the assignment is made to a person to whom the landlord cannot object, that would

(1) 3 Ex. D. 72, at p. 81.
(2) [1891] 1 Q. B. 417.
(3) 1 Cab. & E. 494.
(4) L. R. 9 Ex. 151.

be an authority in this case in favour of the defendants. There is certainly something which appears to support that view in the passage on p. 81 of the report. However, this dictum, or decision, if it has the effect I have indicated, is opposed to the decision in *Barrow* v. *Isaacs*. (1) I should be more satisfied if I were clear that the question raised by the passage I have referred to was argued in the subsequent case. If there is a conflict of authority, and I am to decide this case on first principles, it seems to me to be clear that there was a breach, and I can see nothing which the defendants can set up in a court of law or equity in answer.

ROMER L.J. I think it is quite clear that there was a breach. The proviso to the covenant has no application to this case, for it cannot be said that the lessors unreasonably withheld their consent to a sub-letting, because no consent was asked for. Under these circumstances the lessors have a legal right under the contract which they can enforce by coming to the Court. Then it is said there is some right to equitable relief on the ground that the lessees made a mistake in not asking the consent of their lessors. There are some cases in which equity will interfere on the ground of mistake—generally cases of mutual mistake, but occasionally cases of unilateral mistake. The suggestion that it is a ground for relief in equity, against the enforcement by the landlord of his legal right, that the tenant has committed the breach of covenant either through thoughtlessness or because he thought the breach unimportant, has no foundation in principle or authority.

Appeal dismissed.

Solicitors for plaintiffs: *Bircham & Co.*
Solicitors for defendants: *Harwood & Stephenson.*

(1) [1891] 1 Q. B. 417.

A. M.

C. A.

1899

March 28.

[IN THE COURT OF APPEAL.]

THOMPSON AND ANOTHER *v.* THE LONDON COUNTY COUNCIL.

Practice—Parties—Joinder of Defendants—Separate Cause of Action—Claim for Damages—Order XVI., *rr.* 4, 5, 7.

The plaintiffs brought an action against the defendants for negligently excavating near the plaintiffs' house, and thereby damaging it. The defendants in their defence denied liability, and attributed the damage wholly or in part to the negligence of a water company in leaving their water-main insufficiently stopped. On an application by the plaintiffs to add the water company as defendants:—

Held, that the causes of action against the defendants and the water company being in respect of separate torts, though the resulting damage might be the same in each case, the water company could not be joined as defendants.

APPEAL from an order of a judge at chambers allowing an application made by the plaintiffs to add the New River Company as defendants.

The action was brought by the lessees and occupiers of certain premises in High Holborn. The allegation of the statement of claim was that the defendants, in excavating the earth of the street adjoining the premises and pumping water out of the excavation, negligently abstracted subsoil water and subsoil supporting the premises, which thereby were damaged. The defendants denied the alleged negligence, and that the injuries to the premises were caused by the matters complained of. Their statement of defence alleged, among other things, that the defendants would, if necessary, contend that the injuries were caused wholly or in part by the Central London Railway, who were excavating a large shaft for one of their stations close to the premises, and by the negligence or default of the New River Company in leaving their water-main, at a point in front of the premises, unstopped, or insufficiently and improperly stopped.

The plaintiffs applied to a master at chambers that the New River Company might be added as defendants in the action.

The master refused the application, but his decision was reversed on appeal by Bigham J., who ordered that the New River Company should be added as defendants, and the writ of summons amended accordingly.

The defendants, the London County Council, appealed.

Daldy, for the appellants. Order XVI. relates to the joinder of parties. It does not permit the introduction of a party against whom there is a separate cause of action, but only the introduction of some one against whom the original cause of action could hold good. That is not the case here, for the causes of action are different. If the question were which of the two parties is responsible for the damage caused by the excavation, both might be joined; but the cause of action against the New River Company is for a tort antecedent to and not connected with the excavation. Defendants may be joined where the claim is alternative, as in the case of principal and agent: *Bennetts* v. *McIlwraith* (1); or landlord and tenant: *Child* v. *Stenning* (2); but not where they are sued in respect of separate torts: *Sadler* v. *Great Western Railway* (3); *Gower* v. *Couldridge*. (4)

H. Tindal Atkinson, for the plaintiffs. There is one cause of action only, and the question is whether the defendants or the New River Company are responsible. Mellish L.J. said, in *Honduras Railway* v. *Tucker* (5): "There can be no question that the intention of the Legislature was that it should not be necessary for a plaintiff to bring an action first against A., and then against B., and to run the risk of the jury taking a contrary view of the evidence in the two cases." That is what might happen in the present case—the county council and the New River Company each throwing the blame on the other. The same view was taken by Jessel M.R. in *Child* v. *Stenning*. (2) In *Bennetts* v. *McIlwraith* (1) the causes of action against the principal and the agent were entirely different, for the liability of the latter, if he had no authority

(1) [1896] 2 Q. B. 464.
(2) (1877) 5 Ch. D. 695.
(3) [1896] A. C. 450.
(4) [1898] 1 Q. B. 348.
(5) (1877) 2 Ex. D. 301, at p. 306.

C. A. 1899

THOMPSON v. LONDON COUNTY COUNCIL.

to bind the principal, would arise under a warranty of authority.

A. L. SMITH L.J. I think that this appeal must be allowed. The plaintiffs bring an action against the London County Council for letting down their house. The London County Council by their defence deny that they let down the house, and assert that the persons who let it down were the New River Company, by not looking after their main, so that the land underneath the house got into a moist state, which was the cause of the house falling down. The plaintiffs thereupon desire to join the New River Company as co-defendants. The London County Council object to that, and the question which we have to determine is whether there is power under the rules to add the New River Company as defendants under the facts of this case. I cannot agree with the argument put forward for the plaintiffs, that upon this action the two proposed defendants, the London County Council and the New River Company, are not independent tortfeasors, if they are liable at all. The London County Council is sued on the ground that they have by their excavations let the plaintiffs' house down, and, if the water company is to be sued, it is for allowing water to get out of their main by which the plaintiffs' house was let down. There is no joint tortfeasance between the two. The question is, Who let down the plaintiffs' house? Now, I take the law to be settled by the House of Lords that Order XVI. has relation to the joinder of parties, and not to the joinder of causes of action. The cases were in a state of great complication at one time; but it is no good going over ancient cases under old rules and orders, and for the best of all reasons, that the House of Lords has given definite judgments upon the Order we are now dealing with, and the law is, as I have already stated, that Order XVI. relates to the joinder of parties, and not to the joinder of causes of action. Order XVIII. relates to the joinder of causes of action, but Order XVI. does not. The plaintiffs desire to join the New River Company, but to allow that to be done would be to allow the joinder of a separate cause of action. It is all very well to say that whatever we do

the plaintiffs get the same damages. That is not the question; the question is, who is the tortfeasor?

Coming to the cases, in *Sadler* v. *Great Western Railway* (1) the facts were these: two railway companies had receiving offices on each side of a man's shop, and their vans stood outside their respective offices. They were independent companies, and neither had control over the other. The shopman, who was injured by these separate tortfeasors, claimed damages and an injunction in one action against each company. I held that he could not do so. That case went to the House of Lords, and I will read two passages from the judgment of Lord Watson: "It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate defendants." Now, I ask myself in the present case if this joinder is allowed, and the statement of claim is amended, will there not be two separate and distinct causes of action against two separate and distinct defendants? Of course there will be—there will be one against the London County Council, and one against the New River Company. "I do not," continued Lord Watson, "think that upon any fair construction of his pleadings there is set forth any joint claim against the defendants"—that is not suggested in this case. "In these circumstances it has been painfully apparent from first to last of the learned argument we have heard that the contention of the appellant is not only unsupported by authority, but is in the teeth of authority." It seems to me impossible, in the face of that decision, to say that Order XVI. can be worked in such a way as to do what the plaintiffs want, namely, join two separate and distinct causes of action on this record. It is said this Court decided differently in *Bennetts* v. *McIlwraith* (2); but I do not agree. Redress was sought there against two persons; but the right to relief arose out of a common transaction. That is not an action against two independent tortfeasors; but, as I pointed out in my judgment, the redress was sought against two persons, but the right to it arose out of one transaction. I went on to say that the very point had been

(1) [1896] A. C. 450. (2) [1896] 2 Q. B. 464.

C. A. 1899

THOMPSON v. LONDON COUNTY COUNCIL.

expressly decided in 1877 in this Court in the case of *Honduras Railway* v. *Tucker* (1), and in 1888 in *Massey* v. *Heynes* (2), and that these were conclusive authorities, and had not been overruled by *Smurthwaite* v. *Hannay* (3) in the House of Lords. That decision does not conflict with anything that we are deciding in the present case, and this appeal must be allowed.

COLLINS L.J. I am of the same opinion. When it is once admitted that the House of Lords has decided that you cannot embrace in the same writ distinct causes of action against different persons, then I think there is an end of this case, because it ends that which, but for the decision of the House of Lords, might have been a formidable argument—namely, that based upon Order XVI., r. 7. However, it has now been conclusively held more than once that rule 7, as well as the other rules in Order XVI., relates only to the proper parties to the action, and does not enable a plaintiff to bring separate causes of action against different persons in one action. I think that was scarcely contested; but an argument was presented to us which, it appears to me, was based upon a fallacy—that was that because the plaintiffs had claimed only one damage that therefore their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the injuria is another. What constitutes the cause of action is the injuria, the wrong done by a separate tortfeasor; and when we analyze this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts which were done, the one by the London County Council and the other by the New River Company, are entirely disconnected torts—each of them a separate injuria—if it be injuria at all—quite distinct one from the other. The one was done recently by the county council by excavation, and the other at a much earlier date by the water company allowing water from its mains to weaken the soil in front of the plaintiffs' property, and the joint result

(1) 2 Ex. D. 301. (2) (1888) 21 Q. B. D. 330.
(3) [1894] A. C. 494.

of those two independent torts has been that the plaintiffs' house has come down. The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities.

The case chiefly relied on as an authority for the plaintiffs was *Bennetts* v. *McIlwraith*. (1) I was responsible for staying the action in *Smurthwaite* v. *Hannay* (2) in the first instance, and I afterwards in chambers added a defendant in *Bennetts* v. *McIlwraith*. (1) I wish to point out that, from my point of view, I was consistent in both cases, and I think that when *Bennetts* v. *McIlwraith* (1) is examined it is apparent that it does not in the least conflict with the principle I am laying down. In that case there was a contract made by a person who purported to contract on behalf of another. There was only one contract, and that was broken. There was one breach of the contract, but which of two persons broke it? If the person who purported to act for another person had authority, that other person, and that other person only, was liable. If he had not authority he himself was liable. In either case there was but one contract and one breach. It is true that in a somewhat roundabout way an agent is reached on the technical count that he held himself out as having authority, but this is a matter of form rather than of substance, and it may be that he might be reached equally well on the footing of direct liability on his own account, on the same principle on which a person purporting to contract on behalf of another, who has no existence in fact, was held personally liable in *Kelner* v. *Baxter*. (3) He is liable to the same extent as the person on whose behalf he purported to contract would have been liable if he had had authority. Blackburn J. pointed out in *Fleet* v. *Murton* (4) that the technical mode of suing a broker who did not disclose his principal, and who therefore by the custom became personally liable, would have been to sue him, not directly as principal on the contract, but as a del credere agent. The declaration in that case was simply against the defendants as principals and was nevertheless held

(1) [1896] 2 Q. B. 464.
(2) [1893] 2 Q. B. 412; [1894] A. C. 494.
(3) (1866) L. R. 2 C. P. 174.
(4) (1871) L. R. 7 Q. B. 126.

C. A. 1899

THOMPSON v. LONDON COUNTY COUNCIL.

Collins L.J.

adequate. The mere form of action by which you reach the person who is liable on the same contract on the same breach is immaterial. There is only one contract made and broken, and the question is which of two persons is responsible for that. That is not a new cause of action at all. It is only a question which of two parties is the proper one to be sued.

I am clearly of opinion that this appeal must be allowed.

ROMER L.J. I agree, and I have nothing to add.

Appeal allowed.

Solicitor for defendants: *W. A. Blaxland.*
Solicitors for plaintiffs: *Robbins, Billing & Co.*

A. M.

1899
April 15.

THE QUEEN *v.* ENTWISTLE AND ANOTHER, JUSTICES. *Ex parte* JONES.

Criminal Law—Vagrant Acts—Pretending to tell Fortunes—Intent to Deceive—Rogue and Vagabond—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

By the Vagrancy Act, 1824, s. 4, "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be deemed to be a rogue and vagabond, and be liable to penalties.

A person was convicted of being a rogue and vagabond, for that she did unlawfully pretend to tell fortunes. The information alleged that the defendant did pretend or profess to tell fortunes. The justices were satisfied on the evidence that the defendant had unlawfully pretended to tell fortunes to deceive and impose upon certain of Her Majesty's subjects.

On the argument of an order nisi for a certiorari to remove and quash the conviction:—

Held, that, in order to justify a conviction under the statute, there must be an intent to deceive, but that the intent was implied in the words "pretending or professing," and therefore it was unnecessary that the intent should be specifically alleged, and the conviction was good.

AN order nisi had been granted, calling on two justices of the peace for the city of Manchester, and the prosecutors, to shew cause why a writ of certiorari should not issue to remove

1899

REG. v. ENTWISTLE. JONES, *Ex parte.*

and quash a conviction, whereby Georgina Jones was convicted of being a rogue and vagabond, for that she did unlawfully pretend to tell fortunes, contrary to the form of the statute in that case made and provided. (1)

The order nisi had been obtained on the ground that the alleged offence, of which Georgina Jones was convicted, was not an offence against the statute 5 Geo. 4, c. 83, the objection taken being, that no intent to deceive and impose on any of Her Majesty's subjects was alleged in the information or in the conviction. The information stated that the defendant did pretend or profess to tell fortunes, contrary to the statute. It was sworn in an affidavit made by one of the justices, that the court of summary jurisdiction were satisfied, upon the evidence given upon the hearing of the charge, that Georgina Jones had unlawfully pretended to tell fortunes, and further that she had so unlawfully pretended to tell fortunes to deceive and impose upon certain of Her Majesty's subjects.

Walter C. Ryde shewed cause. The conviction is good. It is unnecessary that an intent to deceive or impose on any person should be expressly alleged in the information and conviction. The words in the statute, 5 Geo. 4, c. 83, s. 4, "to deceive and impose on any of His Majesty's subjects," govern only the words immediately preceding them, "using any subtle craft, means, or device, by palmistry or otherwise," and do not refer to the earlier words, "pretending or professing to tell fortunes." A deceitful intent is implied in the words "pretending or professing." It is shewn by the affidavit of one of the justices that the intent was proved to the satisfaction of the Court. The decision of the Court of Justiciary in Scotland, *Lee or Smith* v. *Neilson* (2), which will be relied on in support of the order nisi, is distinguishable, for in that case the contention in support of the conviction was, that no intent need

(1) The Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4, by which "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be deemed a rogue and vagabond, and shall be liable to certain penalties.

(2) (1896) 23 Rettie (Just. Cases) 77; 2 Adam, 145.

1899

REG. v. ENTWISTLE. JONES, *Ex parte.*

exist. If the decision is in point, it is wrong, and ought not to be followed. The English cases are in favour of the view that the present conviction is valid: *Monck* v. *Hilton* (1); *Penny* v. *Hanson*. (2) If, however, there is any defect, it can be amended: Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 7. On this point the case in the Court of Justiciary has no application, for the statute does not extend to Scotland: s. 19.

T. P. Perks, in support of the order nisi. The cases relied on in support of the conviction are not in point. *Monck* v. *Hilton* (1) was decided on the words "using any subtle craft, means, or device, by palmistry or otherwise." In *Penny* v. *Hanson* (2) the intent was alleged in the information. The statements relied upon in those cases were only obiter dicta, and unnecessary for the decisions. Both those cases were cited in *Lee or Smith* v. *Neilson*. (3) The decision of the Court of Justiciary is directly in point, and is sound law, and ought to be followed. Here the information, the warrant, and the conviction, all omit any allegation of intent. That is a matter of substance, and not a mere mistake or omission which can be amended. It is not an omission or mistake in drawing up the order or judgment, within the meaning of 12 & 13 Vict. c. 45, s. 7. [The following cases were also referred to: *Reg.* v. *Higham* (4); *Reg.* v. *Cridland* (5); *Reg.* v. *Hellingley* (*Inhabitants*) (6); *Reg.* v. *Kay* (7); *Reg.* v. *Middlesex* (*Justices*) (8); *Reg.* v. *Padbury*. (9)]

DARLING J. This is an application for a writ of certiorari, to bring up and quash the conviction of Georgina Jones, who was charged, under the Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4, upon an information, which alleged that she did pretend or profess to tell fortunes, contrary to the form of the statute. The material words in the section are, "Every person pretend-

(1) (1877) 2 Ex. D. 268.
(2) (1887) 18 Q. B. D. 478.
(3) 23 Rettie (Just. Cases) 77; 2 Adam, 145.
(4) (1857) 7 E. & B. 557; 26 L. J. (M.C.) 116.
(5) (1857) 7 E. & B. 853; 27 L. J. (M.C.) 28.
(6) (1859) 1 E. & E. 749; 28 L. J. (M.C.) 167.
(7) (1873) L. R. 8 Q. B. 324.
(8) (1877) 2 Q. B. D. 516.
(9) (1879) 5 Q. B. D. 126.

1899

REG. v. ENTWISTLE. JONES, *Ex parte*. Darling J.

ing or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects." The information in the present case did not allege more than that the person charged did pretend or profess to tell fortunes, and it is contended on her behalf that the information is bad, and the conviction upon it is bad, because the information did not go on to allege that she did pretend to tell fortunes with intent to deceive and impose on some one of Her Majesty's subjects; that is to say, it is contended that the allegation of intent to deceive and impose on some one is material, and that it is necessary that the intent, not only should be proved at the hearing, but should be alleged in the information. It was urged that the statute must not be read so as to mean that the intent to deceive can be found in, or implied from, the use of the words "pretend or profess," but that the intent must be expressly alleged in the information. Cases were cited in support of this contention, and, among others, the decision of the Court of Justiciary in Scotland in the case of *Lee or Smith* v. *Neilson* (1) was relied upon, as an authority for the proposition, that the words "with intent to deceive and impose on" form a necessary part of the averment in the information. If the case really decides this, I should not be inclined to take the same view; but Lord Young's judgment differs in a material point from that of the Lord Justice-Clerk, who was of opinion that the complaint should have contained an allegation of the intent to deceive and impose. Lord Young holds that the intent must exist, but he goes on to say: "There is the word 'pretend' used, but the case for the prosecutor here is, that it is not necessary that there should be an intent to deceive and impose upon. Indeed everything here is consistent with the fact that the person who told the fortune had no belief in the thing herself, and knew that the person who gave 6*d.* had no belief in the thing either. That was the prosecutor's view, we are told by the counsel who represents him, and that was the view on which the conviction proceeded. So that it really comes to this, that any one telling fortunes by reading the lines on

(1) 23 Rettie (Just. Cases) 77; 2 Adam, 145.

1899

REG. v. ENTWISTLE. JONES, *Ex parte.*

Darling J.

the hand is guilty of roguery and vagabondry, and liable under this section to its penalties. I think that that is extravagant." I think so too. I do not intend to hold that it is not necessary there should be an intent to deceive and impose upon. But here the justices, as appears from the affidavit of one of them, "were satisfied, upon the evidence given upon the hearing of the charge, that Georgina Jones had unlawfully pretended to tell fortunes, and, further, that she had so unlawfully pretended to tell fortunes to deceive and impose upon certain of Her Majesty's subjects." In the Court of Justiciary in Scotland it was contended, not only that it was not necessary to aver in the information that the fortune-telling was done with intent to deceive and impose upon, but that it was not necessary that any such intent should exist on the part of the fortune-teller. In *Monck* v. *Hilton* (1) Cleasby B. said: "The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so)." I agree with that. I think that the use in the statute of the words "pretending or professing to tell fortunes," without resorting to that part of the statute which contains the words "to deceive and impose on," does import that deception is practised by doing so. In my opinion if a person were to say, "I am not a real fortune-teller; I cannot tell fortunes; what I am about to tell you must not deceive in any way, but I will pretend or profess to tell your fortune by the use of the ordinary means which people use to tell fortunes," there no offence would be committed, because, if an offence were charged, it would be a sufficient defence to prove that there was no intention to deceive, but that what was done was done simply as an amusement. But the words of the Act of Parliament are wide enough to cover intent to deceive, and I think they do import that deception was practised. I agree with the passage which I have cited from the judgment of Cleasby B., whether what he said was obiter dictum, and unnecessary for the decision of the case then before the Court, or not. I think what he said is good sense and good law, and I agree with it, whether it is binding on me or not. The view I have expressed is further

(1) 2 Ex. D. 268, at p. 276.

confirmed by the use of the words, "or using any subtle craft, means, or device, by palmistry or otherwise." It was necessary to insert the words "or otherwise" to meet a case where the subtle device proved might not amount to palmistry, and the use of the words "or otherwise" renders the insertion of the words "to deceive and impose on" necessary, for, if the latter words were not inserted, the clause might include the use of any innocent device. For the reasons which I have given, I am of opinion that the information is good, and the conviction must stand. I also think that we could amend the information, but it is not necessary.

CHANNELL J. I am of the same opinion. I think that, in order to render a person liable to conviction on such a charge as this, the act must have been done in order to deceive and impose on some one; but this is so, not because the latter words, "to deceive and impose on," apply to the words "pretending or professing to tell fortunes," but because the intent is included in the words "pretending or professing." If there is not deceit, there is not any pretending or professing. I think those words mean representing with the intention that the representation should be believed. For instance, acting a character in a play is not a pretence that the person acting is the person whom he represents on the stage. I am therefore of opinion that this is a good information. I am inclined to think also that the information might be amended, if it were necessary to do so, but I do not wish to decide this, as I prefer to put my decision on the other point.

Order nisi for certiorari discharged.

Solicitors for applicant: *Jaques & Co., for Dodson & Co., Stainland and Halifax.*

Solicitors for justices: *Austin & Austin, for Thomas Hudson, Deputy Town Clerk, Manchester.*

P. B. H.

1899

Feb. 27;
March 29.

HARFORD *v.* LINSKEY.

Municipal Corporation—Election—Right to Petition—Candidate—Nomination of Disqualified Person—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 77, 88.

By s. 88 of the Municipal Corporations Act, 1882, "An election petition may be presented . . . . by a person alleging himself to have been a candidate at the election."

By s. 77, "'Candidate' means a person elected, or having been nominated, or having declared himself a candidate for election."

The petitioner and respondent were nominated in proper form for election to the office of councillor for a ward in a borough. The petitioner at the time of his nomination was interested in a contract with the corporation of the borough. The respondent objected to the petitioner's nomination on the ground that he was, by reason of his interest in the contract, disqualified for election. The mayor allowed the objection, and the respondent, being the only other person nominated, was declared elected. It was conceded by the respondent, upon the authority of *Pritchard* v. *Mayor of Bangor*, (1888) 13 App. Cas. 241, that the mayor had no jurisdiction to entertain the objection to the petitioner's nomination, but it was contended that the petitioner had no right to present a petition:—

Held, (1.) that the petitioner was disqualified for nomination, none the less because he might by assigning his interest in the contract have got rid of his disqualification before the date of the poll; but

Held, (2.) that the petitioner, although disqualified for election and nomination, having in fact been nominated in proper form, was a "candidate" within the meaning of s. 77, and consequently entitled under s. 88 to present a petition for the purpose of questioning the election of the respondent.

Monks v. *Jackson*, (1876) 1 C. P. D. 683, distinguished.

CASE stated by an election court under 45 & 46 Vict. c. 50, s. 93.

The city of Liverpool is a city to which the Municipal Corporations Act, 1882, applies, and is divided into twenty-eight wards, one of which is called the South Scotland Ward. This ward is represented in the city council by three councillors, and one of such councillors goes out of office on November 1 in each year.

On October 18, 1898, the town clerk of the said city duly published notice in the words of Form H in Part II. of Sched. VIII. of the Municipal Corporations Act, 1882, that the

last day for the delivery of nomination papers for the nomination of candidates at the then ensuing election for the said ward was October 24, 1898, that candidates must be duly qualified for the office to which they were nominated, and that the lord mayor would attend at the town hall on October 25 to hear and decide objections to nomination papers.

On October 24 a nomination paper was duly delivered at the town clerk's office, by which the petitioner, being a person enrolled and entitled to be enrolled as a burgess, was nominated as a candidate for the said office. The nomination paper was in all respects in accordance with the rules contained in Part II. of Sched. III. of the said Act.

The respondent and one Patrick Kelly were also duly nominated as candidates for the said office; but Kelly afterwards duly withdrew his nomination, and thereupon ceased to be a candidate at the election.

On October 25 the lord mayor duly attended at the town hall. The petitioner and the respondent also attended, and the respondent thereupon duly delivered to the lord mayor an objection in writing to the nomination paper of the petitioner on the grounds, "That he is now a contractor to and with the Liverpool Corporation, and is directly interested in contracts with the corporation for the supply of police uniform requisites. One of such contracts is dated the 5th November, 1896, and continues to run until the 31st December, 1898." The petitioner was heard in answer to the objection, and thereupon explained that there had been only one contract such as referred to in the objection, and that he had assigned all interest in that contract to one William Drew, and contended that the question of his alleged disqualification did not affect his nomination, and could only affect his election in the event of his being elected. Notwithstanding this contention, the lord mayor allowed the objection, and gave his decision in writing to that effect.

The petitioner is and was a partner in the firm of F. J. Harford & Co. By a contract dated November 5, 1896, the said firm of F. J. Harford & Co. contracted to deliver to the corporation of Liverpool certain requisites for police uniforms

1899

HARFORD v. LINSKEY.

in such quantities as should from time to time be required by the head constable from January 1, 1897, to December 31, 1898. By the terms of the contract it was provided that the said firm should not transfer or assign the contract or any part, share, or interest therein without the written consent of the corporation under the hand of the town clerk. On October 23 or 24, 1898, previously to the delivery of the petitioner's nomination paper as aforesaid, the said firm made verbal arrangements with the said William Drew to take over and carry out in all respects the said contract, and on October 24 notice in writing thereof was given to the town clerk by the said firm and by the said Drew respectively. These arrangements were made without the consent of the corporation.

On October 27 there was a meeting of the council at which the petitioner intended to apply for the consent of the corporation to the assignment by his firm of all their interest under the contract to the said Drew. The petitioner abandoned such intention after and in consequence of the said decision of the lord mayor. No such application was in fact made at that meeting by the petitioner or the said Drew. Such consent of the corporation was given subsequently to November 1, 1898.

On November 1, 1898, an election was held to fill ordinary vacancies in the office of councillor for the different wards of the said city, and on that day the respondent was declared to be elected as being the only person validly nominated for the South Scotland Ward.

On November 14 the petitioner duly presented a petition praying that it might be determined that the respondent was not duly elected.

The questions for the opinion of the Court were:—

1. Whether upon the facts above stated the petitioner was a candidate at the above election and was duly nominated and entitled to present this petition.

2. Whether upon the facts above stated the lord mayor was right in allowing the said objection.

Macmorran, Q.C., and *S. H. Day*, for the petitioner. To deal with the second question first. By s. 55 of the Municipal

Corporations Act, 1882, the nomination of candidates for the office of councillor shall be conducted in accordance with the rules in Part II. of the third schedule. Rule 9 of that part prescribes the duty of the mayor, which is to "decide on the validity of every objection made in writing to a nomination paper." Here the objection was not to anything appearing on the face of the nomination paper. The case of *Pritchard* v. *Mayor, &c., of Bangor* (1) is conclusive that the returning officer has no jurisdiction to determine the question of disqualification.

Upon the other question, the petitioner was entitled to present this petition. Sect. 88, sub-s. 1, of the Municipal Corporations Act, 1882, provides that "an election petition may be presented . . . . by a person alleging himself to have been a candidate at the election." And s. 77 defines a candidate to mean "a person elected, or having been nominated, or having declared himself a candidate for election." Here Mr. Harford was duly nominated, and he also declared himself to be a candidate. The fact that a person is disqualified at the time of his nomination does not disentitle him to go on to election if he can get rid of his disqualification in the interval.

Robson, Q.C., and *Coward*, for the respondent. It is conceded that the mayor had no jurisdiction to decide the objection to the petitioner's nomination. But the petitioner was not entitled to petition. He was not a candidate within the meaning of s. 88. By s. 54, "nine days at least before the day for the election of a councillor the town clerk shall prepare and sign a notice thereof, and publish it by fixing it on the town hall, and, in the case of a ward election, in some conspicuous place in the ward." And by s. 240, "The forms in the eighth schedule or forms to the like effect, varied as circumstances require, may be used and shall be sufficient in law." Form H of Sched. VIII., which is one of the forms relating to elections, says, "Take notice . . . . 3. Candidates must be duly qualified for the office to which they are nominated." Here admittedly Mr. Harford was at the time of his nomination disqualified by s. 12, sub-s. 1 (*c*), by reason of his having an interest in a

(1) 13 App. Cas. 241.

1899

HARFORD v. LINSKEY.

contract with the corporation. By the terms of that contract an assignment of it was to be ineffectual without the written consent of the corporation, which had not then been obtained. It is true that he declared himself to be a candidate, but s. 77 means to refer to a person who truly declares himself to be a candidate. A person cannot by a wrongful declaration acquire privileges which he would not otherwise possess. The petitioner must be regarded as having knowledge of the terms of the town clerk's notice, and therefore as having known that due qualification for the office was essential to a valid nomination. In the case of *Monks* v. *Jackson* (1) there are dicta to the effect that a petitioner who is not duly nominated is not qualified to appear to question the validity of an election. The candidate's qualification must exist at the date of the nomination, for otherwise, if there were only one candidate, he would there and then be deemed to be elected by s. 56, sub-s. 2, although he was disqualified.

Macmorran, Q.C., in reply. The disqualification here was a transient one, which was capable of being removed. In the *Bristol Case* (2) it was held in the case of a parliamentary election that the acquisition of a qualification even during the poll was sufficient. A person has a right to be nominated even if he cannot be validly elected. In the event of a disqualified person being nominated there are only two courses open to his opponents: (1.) to give notice to the voters that votes given for the disqualified person will be thrown away, and (2.) to petition. In *Monks* v. *Jackson* (1) there had been no nomination of any kind; the nomination paper had been wrongly delivered by an agent instead of by the candidate or his proposer or seconder personally.

Cur. adv. vult.

March 29. The judgment of the Court (Wright and Bruce JJ.) was delivered by

WRIGHT J. On October 24, 1898, the petitioner and the respondent were nominated in proper form for election to the office of councillor for a ward in the city of Liverpool.

(1) 1 C. P. D. 683.

(2) Simeon on Elections, p. 47.

1899

HARFORD v. LINSKEY.

Wright J.

The respondent objected to the petitioner's nomination on the ground that the petitioner was then interested in contracts with the corporation, and was therefore disqualified by s. 12 of the Municipal Corporations Act, 1882, which enacts that "a person shall be disqualified for being elected and for being a councillor" if and while he is so interested. The lord mayor allowed the objection, and thereupon the respondent became the only person standing nominated, and on November 1 he was declared by the returning officer elected as upon an uncontested nomination. The petitioner admits that at the time of his nomination he was interested in contracts with the corporation, but he contends that he could and would have got rid of his disqualification before the day fixed for the poll, and was therefore not disqualified for nomination; and he contends that, at any rate, the lord mayor was wrong in entertaining the objection, and the returning officer wrong in declaring the respondent elected as upon an uncontested election. It is now admitted that, having regard to the case of *Pritchard* v. *Mayor, &c., of Bangor* (1) in the House of Lords, the lord mayor must be taken to have had no power to entertain an objection of this kind, and although the returning officer was bound to act on the lord mayor's allowance of the objection, and was bound to declare the respondent elected as upon an uncontested nomination, yet it seems clear that the election and declaration of it were voidable on petition if it is shewn on petition that the lord mayor rejected a nomination which he had no power to reject, and the petition, if it had been brought by voters, must have succeeded to the extent of unseating the respondent and rendering a fresh election necessary. We have to determine whether the same consequence ought not to follow upon the petition of the excluded candidate; and this involves, or may involve, the determination of two questions, the first whether this petitioner was disqualified for nomination; the second, whether if so disqualified, he can maintain this petition, as voters could have done, so far as to unseat the respondent who has been wrongly declared elected.

With respect to the first question, we have not been able to

(1) 13 App. Cas. 241.

1899

HARFORD v. LINSKEY.

Wright J.

find any authority in point. No case of the kind seems to have occurred under the Municipal Corporations Acts, and the cases of parliamentary elections to which we have been referred, or which are collected in Hatsell's Precedents, Sir Thomas Erskine May's Parliamentary Practice, and the old editions of Rogers on Elections, do not throw any light on the matter. They are mostly cases where the disqualification was not for election, but for sitting or voting. In the absence of any guide, we think it safest to hold that in cases of elections under the Municipal Corporations Acts a person, who at the time of nomination is disqualified for election in the manner in which this petitioner was disqualified, is disqualified also for nomination. The nomination is for this purpose an essential part of the election, and if there are no competitors it of itself constitutes the election by virtue of the express words of s. 56. A different construction might produce much confusion. On the nomination day no one could know whether the persons nominated will at the poll be effective candidates or not. It is true that in the case put the disqualification may be removed before the election is completed; but what is to be the effect if the disqualification continues until the poll begins, or until the middle of the polling day, or until the close of the poll? Will votes given before the removal of the disqualification be valid? If not, how is the number of them to be ascertained? It seems to us unreasonable to hold that the Act means to leave the matter in such a state of uncertainty, and for these reasons we think that this petitioner was disqualified for nomination or election. It is not necessary to say whether the same conclusion would follow if the disqualification was such as must necessarily cease at a time between nomination and poll, as, for instance, if a person were nominated on the last day of his minority for a poll to take place on a future day.

On the second question there is not less difficulty. The 88th section of the Act provides that "an election petition may be presented either by four or more persons who voted or had a right to vote at the election, or by a person alleging himself to have been a candidate at the election." By s. 77 the word "candidate" is for the purposes of Part IV. of the Act (in

which both these sections are included) interpreted as follows: "'Candidate' means a person elected, or having been nominated, or having declared himself a candidate for election." By Sched. VIII., Form H, the notice of election which is to be given by the town clerk under s. 54 is to state that "candidates must be duly qualified for the office to which they are nominated." The question which we have now to decide depends primarily on the construction of s. 88. The words "a person alleging himself to have been a candidate" cannot of course mean that a mere allegation without any colour of foundation in fact would suffice. Such a merely false allegation would be properly dealt with in a summary way. But the words used seem designed to express something wider than absolutely valid candidature, and they are at any rate consistent with the view that any person who was in fact a candidate may present and maintain a petition, just as persons who voted in fact may do whether or not they had a right to vote. Nor does there seem to be any sufficient reason why the words should be limited even to persons who have been in fact nominated in due form. It is quite possible that an intended nomination of a person may have fallen through or have been prevented in such a way that the election of another person may have been invalid—as, for instance, if the town clerk refused to supply a nomination paper, or if, by design or negligence, he, in exercising his important duty under Sched. III., Part II., r. 6, filled up a nomination paper so imperfectly as to avoid the nomination, or if, as in *Howes* v. *Turner* (1), he issued a bad notice of election, and in any such case it can hardly have been intended to deprive the aggrieved person of the right to petition. Such a construction is, further, the only one which will fit the interpretation of "candidate" in s. 77. Possibly that interpretation was inserted for a different purpose, namely, to define the limits of time within which a person should be affected by the enactments relating to corrupt or illegal practices. But there is nothing which expressly limits s. 77 to that purpose, and there seems to be no reason why it should not be applied to s. 88, as primâ facie it ought to be, and if this is the proper

(1) (1876) 1 C. P. D. 670.

1899

HARFORD v. LINSKEY.

Wright J.

construction of s. 88, either as taken by itself or as interpreted by s. 77, it does not seem to be affected by the form of notice in Sched. VIII., Form H, which is not intended as a definition of a candidate, or as of itself an enactment of any kind, but it is a mere notice calling attention to the enactments of the statute. And, if literally construed, it is irrelevant, because it refers, not to disqualification, but to qualification, and here the petitioner was qualified under s. 11, though he was disqualified under s. 12. But then it is said that, assuming the primâ facie meaning of s. 88 to be in favour of the petitioner, such a construction ought to be rejected because it may produce inconvenient or unreasonable consequences. For instance, in the present case, a person who was disqualified for election will unseat a person who, if the election had proceeded, either would have been validly elected, or if defeated could on petition have unseated the present petitioner. Such an argument ab inconveniente ought not to be allowed to override the proper construction of the language of the Act unless the inconvenience is clear and great. The same result might have followed if voters had been the petitioners. An election petition is not simply a matter between the parties, but is of public concern. If the election had proceeded, as it ought to have done, the respondent might not have been elected, and although in that case he could have unseated the petitioner, he might not have been able to claim the seat. Nor is the argument ab inconveniente all in favour of the respondent. If his contention is right, a petition may be brought by a person who is believed by himself and by every one else not to be disqualified, and who was properly nominated, and yet after a long trial it may turn out that he was not qualified to be a candidate or was disqualified, and thereupon, if the respondent's contention is right, it would seem that the petition must abate, no matter what transactions of public concern may be involved; and no other petition could in most cases be brought. For these reasons, if the matter were entirely clear of authority, we should be of opinion that the petitioner, having been in fact a candidate duly nominated in point of form, is entitled to maintain this petition.

But it is contended that the case of *Monks* v. *Jackson* (1), decided in 1876 on the repealed Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), is inconsistent with this view. There the returning officer had allowed an objection to the petitioners' nomination on the ground that their nominators were not duly qualified, and the petition sought to unseat the respondent on the ground that the objection was unfounded and ought to have been disallowed. The respondent contested the petitioners' right to petition, on the ground that the petitioners themselves had not in fact been nominated in due form. The petitioners in effect replied that this point had been raised at the nomination and disallowed by the returning officer, and that by the express terms of the Act of 1875, s. 1, sub-s. 3, that disallowance was final. A case was stated, and it was held by Lord Coleridge C.J. and Archibald J. that the petitioners had not been effectively nominated in point of form, and that, notwithstanding the express terms of s. 1, sub-s. 3, this was fatal to the petitioners' right to petition. During the argument Archibald J. is reported to have said, "The petitioners must shew that they were entitled to be candidates," and Lord Coleridge C.J. to have said, "If upon the face of the case it appears that there is a fatal objection to your being petitioners, are we not to decide upon that matter?" In giving judgment dismissing the petition, Lord Coleridge said: "The case therefore shews on the face of it that the petitioners were not duly nominated as candidates and had no right to go to the poll, and that if they had been elected their election must have been set aside. . . . It appearing on the face of the case that the petitioners were not duly nominated, there is no ground for questioning the election of the respondents." And Archibald J. said: "The petitioners are shewn not to be qualified to appear to question the validity of the election." We are unable to discover any material difference between the language of the Acts on which *Monks* v. *Jackson* (1) was decided, and the language of the Act of 1882 on which this case depends, and although the considerations which have led to a conclusion in favour of the present petitioner's right to maintain his

(1) 1 C. P. D. 683.

1899

HARFORD v. LINSKEY.

Wright J.

petition were not presented to the Court in *Monks* v. *Jackson* (1), we ought to follow the decision in that case, if it can be supported since the *Bangor Case* (2), and if it is in point. We think, though not without doubt, that it is not in point. The decision was that the petitioner had not been nominated in fact, and therefore was not qualified to petition. Here the petitioner was nominated in fact, his nomination was in form regular, and he was therefore a candidate, and in our opinion qualified to maintain this petition (not of course for the purpose of claiming the seat, but for the purpose of shewing that there was no valid election), as any of the persons who voted at the election might have done, whether they had a right to vote or not.

Our decision does not involve the proposition that in every case a person whose nomination has been rejected on the ground of disqualification, or want of qualification, can maintain a petition. We do not understand it to be laid down in the *Bangor Case* (3) that a nomination cannot ever be rejected except for informality in the form or presentation of it. If the nomination paper is, on the face of it, a mere abuse of the right of nomination or an obvious unreality, as, for instance, if it purported to nominate a woman or a deceased sovereign, there can be no doubt that it ought to be rejected, and no petition could be maintained in respect of its rejection.

Judgment for the petitioner.

Solicitors for petitioner: *Pritchard & Sons, for Collins, Robinson & Driffield, Liverpool.*

Solicitors for respondent: *Sharpe, Parker & Co.*

(1) 1 C. P. D. 683. (2) 13 App. Cas. 241, see per Lord Herschell, at p. 257. (3) 13 App. Cas. 241.

J. F. C.

In re COOK.
Ex parte CRIPPS.

1899
April 13.

Solicitor—Costs—Property Recovered—Bankruptcy of Judgment Debtor—Charging Order on Dividend.

Where a solicitor employed to prosecute an action for the recovery of a debt obtains judgment on behalf of his client, and the judgment debtor becomes bankrupt, the Bankruptcy Court has no jurisdiction to order the trustee of the bankrupt's estate to pay to the solicitor, on account of his costs incurred in recovering the judgment, the amount payable to the judgment creditor by way of dividend.

APPEAL from the county court of Kent.

In 1893 Mr. W. C. Cripps acted as solicitor for one Fooks in an action brought by Fooks against the debtor George Cook for specific performance of an agreement to take a house, and for the recovery of a sum of 90*l.* 5*s.* The plaintiff Fooks obtained judgment for the money claimed with 4*l.* 11*s.* 7*d.* interest, and costs of the action. The costs were taxed at 130*l.* 10*s.* 10*d.* The debtor failed to pay any part of the judgment debt and costs. In March, 1894, a receiving order was made against the debtor, and in February, 1895, Fooks proved in the bankruptcy for the sum of 225*l.* 7*s.* 5*d.*, being the amount of the judgment debt and costs, and the proof was admitted by the trustee. A dividend was declared by the trustee of 3*s.* 10*d.* in the pound, and there became payable upon the proof of Fooks the sum of 43*l.* 9*s.* 8*d.* No part of the above-mentioned costs had been paid by Fooks to Mr. Cripps. In March, 1895, Fooks had disappeared, and he had not since been heard of. Mr. Cripps in January, 1899, applied to the judge of the county court in which the debtor's estate was being administered for an order that the trustee should pay to him the amount of the said dividend of 43*l.* 9*s.* 8*d.* The judge dismissed the application. The applicant appealed.

McIntosh, for the applicant. But for the bankruptcy of the judgment debtor the applicant might have attached this debt

1899

COOK, *In re.* CRIPPS, *Ex parte.*

under the garnishee procedure. But the bankruptcy prevents that procedure from being applicable: *Prout* v. *Gregory*. (1) The judge having jurisdiction in the bankruptcy has, however, power to make a charging order in the applicant's favour under s. 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), upon the dividend as being property recovered: *In re Suffield and Watts, Ex parte Brown*. (2) At any rate, he has jurisdiction to make the order asked for under s. 102, sub-s. 1, of the Bankruptcy Act, 1883, under which "every Court having jurisdiction in bankruptcy . . . . shall have full power to decide all . . . . questions whatsoever . . . . which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice."

Hohler, for the trustee in bankruptcy, was not called upon.

WRIGHT J. This is an application for an order to charge a dividend payable in bankruptcy on a proof for a judgment debt and costs in favour of the solicitor through whose instrumentality the judgment was recovered and whose bill of costs remains unpaid. The power of the Court to make such an order depends partly upon its common law jurisdiction, and partly upon s. 28 of the Solicitors Act, 1860. The common law jurisdiction does not exist in the case of bankruptcy. Nor do I think there is any power in such a case as this to make the order under the Act of 1860. Sect. 28 of that Act provides that "In every case in which a . . . . solicitor shall be employed to prosecute or defend any suit matter or proceeding in any court of justice it shall be lawful for the Court or judge before whom any such suit matter or proceeding has been heard or shall be depending to declare such . . . . solicitor entitled to a charge upon the property recovered or preserved." That section only gives the power to the Court or judge before whom the action is tried and the judgment recovered. Here the application is made to the county court, and the judgment was not recovered in the county court, but in the Chancery Division of the High Court. Then it is suggested that there is power to make the order under s. 102 of the Bankruptcy Act. But with that view

(1) (1889) 24 Q. B. D. 281. (2) (1888) 20 Q. B. D. 693.

I cannot agree. I do not think that we have any right to jeopardise property which, in the event of Fooks being insolvent, would belong to the general body of his creditors, or in certain other events would belong to the Crown as unclaimed dividend. The appeal must be dismissed.

BIGHAM J. I agree.

Appeal dismissed.

Solicitors for appellant: *Cripps, Son & Daish, Tunbridge Wells.*

Solicitors for trustee: *Andrew & Cheale, Tunbridge Wells.*

J. F. C.

CUNARD STEAM SHIP COMPANY *v.* COULSON.

1899

March 20.

Revenue—Income Tax—Profits of Trade—Deduction for Depreciation of Machinery or Plant—Customs and Inland Revenue Act, 1878 (41 & 42 *Vict.* *c.* 15), *s.* 12.

The Commissioners of Income Tax, when estimating the deduction to be allowed from the profits of a trade under s. 12 of the Customs and Inland Revenue Act, 1878, "as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern," are not bound to take an average of the depreciations during the three preceding years, but may adopt as their estimate the amount of the depreciation during the year immediately preceding that of assessment.

CASE stated by the Commissioners for the general purposes of the Income Tax Acts for the Division of Liverpool.

At a meeting of the commissioners held at Liverpool on November 26, 1897, for the purpose of hearing appeals against assessments to income tax, the Cunard Steamship Company, Limited, appealed against an assessment to the income tax under Sched. D of 5 & 6 Vict. c. 35, made upon the said company for the year 1897, ending April 5, 1898, on the sum of 25,380*l.*

1. The appellant company claimed that, in accordance with the provisions of s. 12 of 41 & 42 Vict. c. 15, in assessing the profits

1899

CUNARD STEAM SHIP COMPANY v. COULSON.

chargeable under Sched. D, the profits whereof the average was to be taken were the net profits of the preceding three years after deduction of the amounts allowed in respect of those years respectively as representing the diminished value by reason of wear and tear of machinery and plant, and the company objected to the assessment on the ground that it had been in fact arrived at by first taking the average of the profits of the three years without any such deduction, and then from the average of the profits so obtained allowing a deduction for the amount of depreciation in respect of wear and tear in the year 1896.

2. The following facts were found or admitted :—

The Cunard Steamship Company, Limited, owns and has owned for many years a large fleet of steamships trading between Liverpool and North America and elsewhere. Previously to the year 1897 the company has been allowed, for the purpose of arriving at the amount of profits returnable for the year of assessment under Sched. D, to deduct from the earnings of this fleet depreciation for each separate year at the rate of 6 or 5 per cent. per annum (according to the class of vessel) on the diminished or "written down" value of the said fleet, and has up to the year 1897 been assessed to income tax upon a sum equivalent to one-third of the net profits so arrived at of the three preceding years.

The amount of the said earnings, without any deduction for depreciation, was in the year 1894 87,492*l.*, in 1895 138,912*l.*, and in 1896 241,195*l.*, amounting in the aggregate to 467,599*l.*, equal on the average to 155,866*l.* per annum. The amount allowed for depreciation, calculated as aforesaid, was in respect of 1894 137,173*l.*, in respect of 1895 135,790*l.*, and in respect of 1896 130,486*l.*

The amount of the assessment for the year 1897–8 (25,380*l.*) represents the said sum of 155,866*l.* (the amount of the company's profits for one year on the average of the three preceding years), after deducting 130,486*l.* as allowance for diminished value by reason of wear and tear during the last year.

3. The appellant company contended that the assessment should have been on 21,383*l.* only, being the average of the

profits during the three years 1894, 1895, and 1896, after deducting the allowance for depreciation in respect of the same years.

4. The surveyor of taxes contended that the assessment was rightly made on the average of the three years' net profits irrespective of depreciation, with an allowance or deduction therefrom of 130,486*l.*, the amount of the last year's depreciation.

5. The difference between the assessments contended for by the appellants and by the surveyor of taxes may be tabulated as follows:—

A. According to the contention of the appellants—

	1894	1895	1896	
Net earnings .	87,492*l.*	138,912*l.*	241,195*l.*	
Less depreciation	137,173*l.*	135,790*l.*	130,486*l.*	
	49,681*l.* (Loss)	3,122*l.* (Profit)	110,709*l.* (Profit)	Average profit 21,383*l.*

B. According to the contention of the surveyor of taxes—

	1894	1895	1896		
Net earnings	87,492*l.*	138,912*l.*	241,195*l.*	Average .	155,866*l.*
			Less depreciation, year 1896 .		130,486*l.*
					25,380*l.*

The commissioners affirmed the assessment, subject to a case for the opinion of the Court.

Asquith, Q.C., and *Maurice Hill*, for the appellants. Under the Income Tax Act, 1842, though a deduction was allowed in respect of repairs to the plant used in a trade not exceeding the average sum expended for that purpose during the three preceding years, no deduction was allowed for any sum employed as capital in the trade, which in *Forder* v. *Handyside* (1) was held to include any sum set aside to cover the depreciation of the plant of the trade. To meet that decision s. 12 of the Customs and Inland Revenue Act, 1878 (2), was

(1) (1876) 1 Ex. D. 233.

(2) By the Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12, "Notwithstanding any provision

1899

CUNARD STEAM SHIP COMPANY v. COULSON.

passed, by which a deduction is allowed for depreciation by reason of wear and tear "during the year." Those words "during the year" cannot mean during the year of assessment, for the assessment is made prospectively, and the amount of the wear and tear for that year cannot then be known. Nor is there any reason why "the year" should mean the year immediately preceding that of assessment rather than any other year. The words cannot mean anything more than the annual wear and tear. And the sum set apart to cover that wear and tear, representing the cost of new ships added to the fleet to replace those worn out, and being analogous to repairs, it is reasonable that it should be estimated in the same way that the deduction for repairs is estimated—namely, by taking an average of the three preceding years. The Acts of 1842 and 1878, when read together, mean that in estimating the profits of the trade the commissioners are to take the net earnings of the average of three years after all the statutory deductions have been made.

Sir R. Finlay, *S.-G.*, and *Danckwerts*, for the Crown. By the use of the term "during the year" the Legislature meant that the deduction for depreciation was to be estimated on a different principle from that on which the profits of the business are estimated. "The year" means the year of assessment. The deduction is a matter of estimate only. And the proper mode of arriving at that estimate is to take the wear and tear during the last preceding year. But even if the commissioners are not bound to take the depreciation of the last year as their basis, they are entitled to do so, for there is nothing unreasonable in their so doing, and the Act says that

---

to the contrary contained in any Act relating to income tax, the commissioners for general or special purposes shall in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under Schedule D or the profits of any concern chargeable by reference to the rules of that schedule allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on."

they may allow such deduction as they may think just and reasonable.

[They referred to *Caledonian Ry. Co.* v. *Commissioners of Inland Revenue* (1) and *Burnley Steamship Co.* v. *Aiken.* (2)]

Asquith, Q.C., in reply.

GRANTHAM J. In this case I have no doubt that our judgment must be for the Crown. By the Act of 1842 it was provided with reference to the duty to be charged in respect of any trade that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade manufacture adventure or concern upon a fair and just average of three years," and no deduction for depreciation was to be allowed. Then an amendment was introduced by the Act of 1878 to the effect that the commissioners in assessing the profits of any trade shall "allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern." The result is that for the purpose of arriving at the balance of the profits an average of three years is to be taken; but in order to arrive at the sum which is to be allowed by way of deduction from those profits in respect of depreciation the wear and tear during the year only is to be taken into consideration. Whether that is a reasonable rule it is not for us to consider. The language of the Act is precise, and we are bound by what the Legislature has said.

KENNEDY J. I am of the same opinion. It seems to me that the commissioners have not done anything which is forbidden by the Act of 1878. They have made a deduction which they thought just and reasonable, and they have made it in a particular way. I think it was open to them to make it in that way. They were, no doubt, bound to do what was in their opinion just and reasonable; and, if their opinion is open to review, it is not shewn that what they did was unjust or unreasonable. It was contended that s. 12 should be

(1) (1880) 18 S. L. R. 85. (2) (1894) 31 S. L. R. 803.

1899

CUNARD STEAM SHIP COMPANY v. COULSON.

Kennedy J.

read as meaning that the diminished value by reason of wear and tear during the year should be ascertained by taking an average of the depreciation during the three years in respect of which the profits are to be computed under the earlier Act. But I cannot read any such words into the section. What the commissioners have to do is to estimate, according to what is just and reasonable, looking to the business to be assessed and its nature, the amount which ought to be deducted for depreciation during the year in progress when the assessment is made. It has to be an estimate. The commissioners have made that estimate in a particular way. I do not say that they are bound to make it in that way. The Legislature seems to have left a good deal of discretion to those who are making the assessment to consider the particular kind of business that is being dealt with. But I cannot see that the mode of making the estimate adopted in the present case was wrong.

Appeal dismissed.

Solicitors for appellants: *Freshfields & Williams.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

J. F. C.

Distinguished. *Re* BLAND-SUTTON'S WILL TRUSTS. [1950] 2 All E.R. 466.

Followed. *Re* BLAND-SUTTON'S WILL TRUSTS. [1951] 1 All E.R. 494.

[1899] 1 Q. B. 871. *In re* ROYAL COLLEGE OF SURGEONS.

Distinguished. *In re* BLAND-SUTTON, DECD. [1951] 1 Ch. 70

[IN THE COURT OF APPEAL.]

C. A. 1899 *April* 15.

IN THE MATTER OF THE ROYAL COLLEGE OF SURGEONS OF ENGLAND, AND IN THE MATTER OF THE CUSTOMS AND INLAND REVENUE ACT, 1885.

Revenue—Property of Bodies Corporate or Unincorporate — Exemption — Property Legally Appropriated for the Promotion of Science—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-s.* 3.

By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body, corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied for the promotion of education, literature, science, or the fine arts.

The Royal College of Surgeons of England, incorporated by charter, had two main objects: the promotion of the science of surgery, and the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising surgery as a profession, and the examination of students and others to qualify for practice or honours in surgery and kindred subjects. On an appeal against an assessment to duty under the Customs and Inland Revenue Act, 1885:—

Held, that, as the promotion of the interests of those practising surgery as a profession was in itself a main object, and one in respect of which no exemption could be claimed, the only exemption that could be claimed under s. 11 of the Act was in respect of property or income so appropriated as to create a legal obligation to apply it to the promotion of the science of surgery.

APPEAL from a judgment of a Divisional Court on a petition praying for the discharge of an assessment made on the petitioners, the Royal College of Surgeons of England, under s. 11 of the Customs and Inland Revenue Act, 1885.

By the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11, it is enacted that "there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the 5th day of April, 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property. Subject to exemption from such duty in favour of property of the descriptions following . . . .

"(2.) Property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large . . . .

"(3.) Property which, or the income or profits whereof, shall be legally appropriated and applied . . . . for the promotion of education, literature, science, or the fine arts."

The petition averred:—

That the petitioners were a body politic established by Royal charter in the year 1800. That the objects of the petitioners' incorporation, as specified in the said Royal charter, were the benefit of the commonweal of this kingdom by the promotion of the art and science of surgery and the due promotion and encouragement of the study and practice of the said art and science of surgery. That further powers and privileges had from time to time been conferred upon the petitioners by subsequent Royal charters with the object of more effectually promoting and encouraging the study and practice of the said art and science of surgery. That by the charters obligations and duties were imposed upon the corporation for the benefit of the public at large and the promotion and encouragement of the said art and science of surgery. That the petitioners were, under terms imposed by Government, the custodians at their own expense of the Hunterian collection, which is national property. That on June 24, 1894, the annual value or income which had accrued during the year ending on that date from real property was 7200*l.*, the total value of the personal estate was 187,195*l.* 17*s.* 11*d.*, and the income or profits therefrom for the same yearly period was 5833*l.* 5*s.* 7*d.* That the whole of such property real and personal, or the income or profits thereof, was legally appropriated and applied for the benefit of

the public at large or for the promotion of science, literature, or education. That the petitioners were called upon by the Commissioners of Inland Revenue to deliver an account in accordance with s. 17 of the Customs and Inland Revenue Act, 1885, and that they did deliver such an account claiming exemption. That the petitioners were notwithstanding assessed by the commissioners at 3161*l.* and required to pay as duty thereon the sum of 158*l.* 1*s.*, and had been compelled to pay the same. That the said sum of 3161*l.* included the following: 300*l.*, the annual value of that part of the library within the premises 40, 41, 42, Lincoln's Inn Fields; 250*l.*, the annual value of the official residence of the conservator of the museum; 200*l.*, the value of 39, Lincoln's Inn, another portion of the library.

Apart from the claim to total exemption the petitioners submitted that, in any event, the above property was entitled to exemption from duty as property which, or the income or profits whereof, is or are legally appropriated and applied for the benefit of the public at large, or for the promotion of science, literature, or education.

It appeared from the affidavits that the college had fulfilled the duties imposed by the various charters. In conjunction with the Royal College of Physicians examinations were held at an examination-hall on the Embankment, and diplomas were granted to successful candidates. Examinations were also held in dental surgery and diplomas granted. No examination was held at the premises in Lincoln's Inn Fields except such portions of the final examination for fellowship and membership as necessitated reference to the contents of the museum. The nucleus of the museum was the Hunterian collection. A large amount had been expended by the college in building the museum, towards which the Government had contributed a large grant. The library contained a large number of books, and any person having a bonâ fide object in using it could obtain permission to do so, though the regulations gave special advantages to members. Part of the premises in Lincoln's Inn Fields adjoining the museum was appropriated to the conservator of the museum as his official

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

residence, in which he was obliged to reside. There was no school of instruction connected with membership of the college, but lectures on surgical subjects were delivered in the theatre of the college, to which the public were admitted free of charge. There were also prizes for dissertations on matters connected with the science of surgery, and also prizes for original research. Exemption had been claimed and allowed in respect of the museum, but not in respect of the library, the conservator's house, the examination-hall and offices on the Embankment, except such portion as was devoted to laboratories, two houses, 37 and 44, Lincoln's Inn Fields, let on lease, the parts of the houses in Lincoln's Inn Fields used as offices, and stock in the public funds and elsewhere, with certain exceptions. On the hearing of the petition the Divisional Court (Wright and Channell JJ.) held that in addition to the museum the conservator's house was exempt, but not the other property in respect of which exemption was claimed.

The petitioners appealed.

Sir Edward Clarke, Q.C., and *J. R. Paget*, for the appellants. Exemption has been granted by the Crown in respect of the museum, and the Divisional Court has granted exemption in respect of the curator's house, and the question before the Court is whether the property of the college is wholly exempt as legally appropriated and applied, within the principle laid down in *Inland Revenue Commissioners* v. *Forrest* (1), for the benefit of the public at large, or for the purpose of science; and, if not, whether the exemption applies to any portion of the property in respect of which duty has been paid. The test of exemption, as laid down by the House of Lords in *Inland Revenue Commissioners* v. *Forrest* (1), is whether the property is in fact legally appropriated and applied substantially for the promotion of science, and not for the promotion of the professional interest or advantage of the members. The objects of the institution must, as appears from that case, be sought in the charters under which it is incorporated. If it appear from

(1) (1890) 15 App. Cas. 334.

the charter that in the main the object of the institution is the promotion of science in the interests of the public at large, then the exemption applies, although some of the ancillary functions and purposes of the institution may indirectly and incidentally be of benefit to members of a profession. For instance, in the case of *Royal College of Music* v. *Westminster Vestry* (1), an institution for the promotion of music was held entitled to exemption from rates although it provided for educating persons in the art of music and the holding of examinations and granting degrees. In that case no doubt the degrees granted were not legal qualifications for the exercise of a profession; but, if the original objects of the college as established by the charter are such as would exempt its property, the fact that extraneous legislation subsequently annexes to a diploma granted by the college the right to practise cannot have the effect of imposing upon the college a liability to taxation from which its original functions and character would have exempted it. The question is what is the constitutional object of this institution. The holding of examinations is part of that object, but the examinations were for the promotion of the science of surgery and not for the purposes of admission to the profession. At the time when the charter was granted to the college there were not exclusive or preferential rights to practise in surgery or medicine. The Act 18 Geo. 2, c. 15, gave the right of licensing for practice to the corporation of surgeons created by that statute, but that corporation was dissolved in 1799. The charter of 1800 did not profess to give that right to the new body, and the Crown had no power to grant a monopoly or infringe the rights given by 3 Hen. 8, c. 11. The Medical Act, 1858 (21 & 22 Vict. c. 90), was the first Medical Act, and the right to practise given by it depends on registration, not on examination. Neither that statute nor the Medical Act, 1886 (49 & 50 Vict. c. 48), affects to touch the constitution of the college. *Writers to the Signet* v. *Inland Revenue Commissioners* (2) was different from the present case, because the body in question was simply one of several portals to a profession. *Savoy*

(1) [1898] 1 Q. B. 809.

(2) (1886) 14 R. 34; 24 S. L. R. 27.

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

Overseers v. *Art Union of London* (1) turned on the question of the meaning of voluntary contributions.

[They referred also to *Incorporation of Tailors in Glasgow* v. *Inland Revenue Commissioners* (2); *Inland Revenue Commissioners* v. *Scott* (3); *Sulley* v. *Royal College of Surgeons of Edinburgh*. (4)]

Sir R. E. Webster, A.-G., and *Danckwerts*, for the Crown. No doubt one object of the college is the promotion of science; but there is a second object—namely, the professional interests of the members. It is not enough to say that on establishing the first-mentioned object the college can claim exemption, for the exemption can only apply to property legally appropriated and applied to that object, and this has not been shewn. The Crown has not made a claim in respect of the museum, and does not appeal as to the curator's house; but the value of the library is subject to the charge on the ground that it does not come within the terms of the exemption in the statute.

[They cited *Linen and Woollen Drapers' Institution* (5); *Davies* v. *Makuna* (6); *Howarth* v. *Brearley*. (7)]

J. R. Paget, in reply.

Cur. adv. vult.

April 15. The judgment of the Court (A. L. Smith, Collins and Romer L.JJ.) was read by

ROMER L.J. This is an appeal by the Royal College of Surgeons of England, and raises the question whether certain property of the college is subject to duty under the Customs and Inland Revenue Act, 1885. It is contended by the appellants that the property is exempt from duty under sub-s. 3 of s. 11 of the Act, as being property which, or the income or profits whereof, is or are legally appropriated and applied for the promotion of science. In order to see whether this con-

(1) [1896] A. C. 296.
(2) (1887) 14 R. 729; 24 S. L. R. 516.
(3) [1892] 2 Q. B. 152.
(4) (1892) 19 R. 751; 29 S. L. R. 620.
(5) (1887) 58 L. T. 949.
(6) (1885) 29 Ch. D. 596.
(7) (1887) 19 Q. B. D. 303.

tention is correct or not, it is important to ascertain what is the main purpose and object of the college.

It was finally determined by the House of Lords in the case of *Inland Revenue Commissioners* v. *Forrest* (1), that if the main purpose or object of an institution be the promotion of science, though there may be some subsidiary purposes or objects, then its property, having to be applied and being applied for the purposes of the institution, is legally appropriated and applied for the promotion of science within the meaning of these words as used in the Act, and is accordingly exempt from duty. Now the case before us differs essentially from the case above mentioned of the Institution of Civil Engineers before the House of Lords. That institution had only one main object and purpose. The college has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects.

In order to establish this statement as to the second main function, we must shortly refer to some of the more important facts connected with the charters governing the college, and the by-laws, rules, and regulations made thereunder, and the statutes affecting, and duties discharged by, the college. We do not think it necessary for this purpose to inquire in detail into the constitution of, or duties discharged by, the predecessors of the present corporation, though such an inquiry would tend to confirm the views above expressed. We must, however, point out that by an Act of 18 Geo. 2, c. 15, entitled "An Act for making the Surgeons of London and the Barbers of London two separate and distinct corporations," the college's immediate predecessor was incorporated under the title of

(1) 15 App. Cas. 334.

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

Romer L.J.

"The master, governors, and commonalty of the art and science of surgeons of London," and by s. 8 it was provided in substance that persons who passed a satisfactory examination held by that corporation should be at liberty to practise as surgeons. By a charter of March 22, 1800, granted by King George III., the last-mentioned corporation was declared dissolved and the present college was incorporated. In this charter we find the reasons for its grant stated in the following recitals: "And whereas it is of great consequence to the commonweal of this kingdom that the art and science of surgery should be duly promoted, and whereas it appears to us that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science"; and then followed the incorporation of the college. It will be seen from the above recitals that the college was established, not merely for the promotion of the science of surgery, but also for the encouragement and promotion of the practice of surgery. It was also provided by the charter that the college should exercise and enjoy all the rights, liberties, privileges, and possessions of the dissolved corporation, and that the governing body of the college should transact and ordain all such matters and things as the governing body of the dissolved corporation might theretofore have lawfully done, transacted, or ordained. The charter appointed examiners for the college. It also provided that no person should become a member of the college unless he obtained from it letters testimonial of his qualification to practise the art and science of surgery. The examiners were, when requested, to examine all army and navy surgeons and their assistants, and to be paid fees for doing so.

By a subsequent charter of King George IV., dated February 13, 1822, after reciting that it appeared expedient, in order more effectually to promote and encourage the study and practice of the art and science of surgery, that further powers and privileges should be granted to the college, further provisions in its favour were made.

By a charter of Her Majesty, dated September 14, 1843, it is provided, "in order more effectually to promote and encour-

age the study and practice of the said art and science of surgery," that there should be fellows of the college, who were to be appointed after examination by the examiners of the college. By clause 10 of this charter no member of the college was thenceforth to be eligible as a member of the council of the college who was not a fellow, and no fellow was to be eligible whilst practising midwifery or pharmacy, nor unless he should reside and bonâ fide practice his profession of surgeon within five miles from the General Post Office in St. Martin-le-Grand, though these restrictions have been removed by subsequent charters; and by clause 20 all future examiners were to be elected from the council or from the fellows.

By a subsequent charter of Her Majesty, dated March 18, 1852, it was directed that a board of examiners should be appointed by the college for the purpose of testing the fitness of persons to practise in midwifery and of granting certificates of such fitness; and by another charter of September 8, 1859, after referring to the Medical Act, 21 & 22 Vict. c. 90, there was, in pursuance of the power given by that Act, granted to the college power to appoint a board of examiners to test the fitness of persons to practise as dentists who might be desirous of being so examined, and to grant certificates of such fitness, and the college was to receive reasonable fees for the examination.

From the time of the above charters the college continued to hold the examinations thereby directed or provided, and to grant certificates, and to be paid fees for the examinations. In particular we may point out that from the passing of the above-mentioned Act of 18 Geo. 2, c. 15, down to the incorporation of the college, its predecessor continued to hold examinations to qualify persons for practising the profession of surgery, and from its incorporation the college continued the examinations until the Act of 1886 hereafter mentioned came into operation. Persons who passed these examinations became duly qualified to practise under and by virtue of the above-mentioned Act of George 2, which still remains in force. Since the Medical Act of 1886 came into force examinations have been held in pursuance thereof by the college and by the

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

Romer L.J.

Royal College of Physicians, as hereafter more fully stated. The examination by the college in midwifery ceased in 1888, but the examination in dentistry is still continued. These examinations by the college have always been of great importance, and the certificates given to those who passed have been highly valued in the surgical profession, and a large income has been derived by the college from the fees on these examinations.

The importance of the functions discharged and work done by the college, by its examinations and otherwise, in promoting and encouraging the practice and profession of surgery, received further legislative recognition in the year 1858 by the Medical Act then passed. By that Act was established a General Council of Medical Education and Registration of the United Kingdom, and it was provided that one member of that council should be chosen by the college. Numerous powers and duties were imposed on the general council with reference to medical practitioners, and the registration of duly qualified persons thereby provided for. Apart from persons practising before August 1, 1815, only those qualified by certain colleges and bodies as set forth in Sched. A could be registered or obtain the benefit of registration. In Sched. A is included "Fellow or member or licentiate in midwifery of the Royal College of Surgeons in England." Sect. 19 provided that any two or more of the above colleges and bodies might, with the sanction and under the direction of the general council, unite or co-operate in conducting the examinations required for qualifications to be registered under the Act. Sect. 28 provided that, if any of the said colleges or bodies should at any time exercise any power they possessed by law of striking off from their lists any member, notice should be given to the general council, who might thereupon, if they saw fit, strike off the name of such member from the register as a person qualified by being such member, subject to a proviso that no person should be erased from the register on the ground of his having adopted any theory of medicine or surgery. By s. 31 every registered person was to be entitled, according to his qualification, to practise medicine or surgery, or medicine and surgery, as the

case might be, with certain privileges therein mentioned, including the right to recover his charges in a court of law. By s. 32 it was provided that no unregistered practitioner should be entitled to recover his charges in a court of law, and by the Act various other provisions were made in favour of registered practitioners. This Act, with certain amendments, has since continued in force.

By the Medical Act, 1886, certain alterations were made in the general council, but the college had still the right to choose one member of it, and s. 3, sub-s. 1 (*b*), provided that an examination qualifying for registration might be held by any combination of two or more medical corporations in the same part of the United Kingdom who might agree to hold a joint examination in medicine, surgery, and midwifery, and of whom one at least should be capable of granting a diploma conferring the right of registration in respect of medicine, and one at least should be capable of granting such diploma in respect of surgery.

Shortly after this Act, and in pursuance of the above statutory provisions, the College of Surgeons and the Royal College of Physicians agreed to hold, and have since held, such a joint examination as that above mentioned, and for the purpose of such joint examination those two bodies have taken a lease of certain land and erected thereon a hall in which the examination is held; and it is, among other things, in respect of the college's property in this hall, so far as used for the purpose of the examination, that this appeal is brought. The college has further duly recognised and carried out its duties, connected with the practice and profession of surgery, by its by-laws and rules, many of which are devoted to the maintenance of a high standard of honour in that profession. We may refer by way of example to s. 14, sub-s. 1, of the by-laws as to the examinations and qualifications necessary for membership of the college, and to sub-s. 4 as to the declaration required of every person on his admission as a member of the college that he will demean himself honourably in the practice of his profession. See also s. 16 of the by-laws, providing that no Fellow or member of the college should publicly

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

Romer L.J.

profess or advertise a secret method or process of cure relating to his practice as a surgeon, or advertise or publish any matter or thing prejudicial to the interest or derogatory to the honour of the college or disgraceful to the profession of surgery, under penalty of removal from being a Fellow or member of the college. Such removal would, of course, have very serious results on the person removed in his practice, especially having regard to the provisions of the Act of 1858. Sect. 20 of the by-laws may also be referred to as shewing the close connection between the college and the profession. (1) Sub-s. 1 provides for the council annually publishing a list of all hospitals and schools of surgery and medicine whose certificates of the professional education of candidates for the Fellowship would be received by the college. Sub-s. 3 provides for the council making or altering rules respecting the professional education of candidates for the Fellowship; and sub-s. 4 gives the subjects for the professional examinations for the Fellowship. Lastly, the diplomas issued by the college to persons satisfactorily passing the examinations for surgery and dentistry respectively testify under the college seal that those persons are qualified to practise surgery and dental surgery.

We think that the above facts amply shew the dual nature of the object and purpose of the college as above stated by us.

Now, so far as concerns property which may be legally appropriated and applied to what we have called the second main function of the college, as distinguished from its other function of the promotion of the science of surgery, it appears to us clear that such property would not come within any of the exemptions from duty mentioned in s. 11 of the Customs and Inland Revenue Act, 1885. It is equally clear that property which may be legally appropriated and applied by the college for the promotion of the science of surgery is exempt from duty. But a question arises as to property of the college which is not legally appropriated and applied to one of the two main functions of the college as distinguished from the other. Of course in a case like that of the Institution of Civil Engineers

(1) This section relates to the admission to Fellowship by examination, and the declarations to be made prior to admission.

no such question could arise. Where an institution has only one main object and purpose, any property belonging to and properly dealt with by the institution must of necessity "be legally appropriated and applied" for that object and purpose, as was pointed out by the House of Lords. But in a case like the present, where the institution has two main objects, difficulty may arise both under the word "applied" and under the words "legally appropriated." The difficulty under the word "applied" would be merely one of fact—that is to say, the difficulty of determining to which of the two objects the property or its income was in fact being applied. But the words "legally appropriated" raise a question as to their meaning when used in s. 11. They clearly mean something more than "applied." On the construction of the section we agree with the view expressed in the case of *Incorporation of Tailors in Glasgow* v. *Inland Revenue Commissioners* (1) and in the other authorities cited to the same effect, that the words mean that the property or its income is so appropriated as to create a legal obligation upon the part of its administrators to apply it in a particular manner. Now, there has been no legal appropriation in the above sense of any of the properties the subject of the present appeal, or of their incomes, to the first main object of the college as distinguished from the second main object. As above pointed out, seeing that the college has two functions, there can be no legal appropriation to one as distinguished from the other merely from the fact that the college owns the properties; and there has been no appropriation by the college by conveyance, declaration of trust, or otherwise. So that the college is under no legal obligation either to apply any of such properties or their incomes to the first main function of the college, or not to apply them to its second main function. So that there has been no legal appropriation for a purpose exempting from duty. But beyond this we agree with our brothers Wright and Channell in the view they took that no property the subject of this appeal, or its income, is being even "applied" so as to exempt it from duty. For example, the 681*l.* income derived from personal estate is applied for the

(1) 14 R. 729; 24 S. L. R. 516.

C. A. 1899

ROYAL COLLEGE OF SURGEONS OF ENGLAND, *In re.*

Romer L.J.

general purposes of the college and not separately for the purpose of the promotion of science; and the corpus of that personal estate is of course not applied for the last-mentioned purpose. Similar remarks apply to 37 and 44, Lincoln's Inn Fields, and the income derived therefrom. As to the part of the examination-hall made subject to duty, that is applied for the second rather than for the first main purpose of the college. The offices at 40, 41, and 42, Lincoln's Inn Fields, which have been made liable to duty, are not applied, in our opinion, for the promotion of the science of surgery. We feel more doubt as to the libraries, but on the whole we think that they also are not so applied as to exempt them from duty. They appear to us, on the whole, to be like the case cited of the library of the Society of Writers to the Signet, which was held by the Court of Session in Scotland not to be exempt. (1) The appeal therefore must be dismissed with costs.

Appeal dismissed.

Solicitors for petitioners: *Wilde, Moore & Wigston.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) *Writers to the Signet* v. *Inland Revenue Commissioners*, 14 R. 34; 24 S. L. R. 27.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 24.

BARNES AND ANOTHER *v.* GLENTON AND OTHERS.

Limitations, Statute of—Personal Action—Simple Contract Debt charged on Land—Period of Limitation—The Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*The Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

Where an action is brought to recover a simple contract debt, and the money sought to be recovered is charged on land, the period of limitation is that imposed by the Limitation Act, 1623, and has not been enlarged to twelve years by the Real Property Limitation Act, 1874.

Judgment of Lord Russell C.J., [1898] 2 Q. B. 223, reversed.

Sutton v. *Sutton*, (1882) 22 Ch. D. 511, distinguished.

APPEAL from a judgment of Lord Russell of Killowen C.J., on further consideration, reported [1898] 2 Q. B. 223.

The action was brought to recover money lent. The three defendants were originally trustees under a will, and they borrowed a sum of money of the plaintiffs, to whom certain mortgages were transferred. By a declaration of trust made in 1882, to which the plaintiffs and the defendants were parties, it was provided that the money advanced by the plaintiffs should be a first charge on the transferred mortgages. Immediately after the execution of this deed one of the defendants, Angelo Lewis, retired from the position of trustee. Interest was paid by the other two defendants from time to time on the money borrowed of the plaintiffs up to March, 1896.

The action was commenced in April, 1897, to recover the money lent, due under the deed of 1882. The defendants disputed their personal liability, but this point was decided against them. The defendant Lewis further contended that the six years' limitation of actions applied, and was a defence in his case, as his liability (if any) was for a simple contract debt within the meaning of the Limitation Act, 1623, and that, as he had had nothing to do with the trust since 1882, he was within the protection of s. 14 of the Mercantile Law Amendment Act, 1856.

C. A. 1899

BARNES v. GLENTON.

Judgment was given against all the defendants. (1) The defendant Lewis appealed.

C. A. Russell, Q.C., and *Rufus Isaacs, Q.C.* (*H. Greenwood* with them), for the defendant Lewis. The debt being a simple contract debt, the Limitation Act, 1623 (21 Jac. 1, c. 16), applies, and that being so, the defendant Lewis is protected by the Mercantile Law Amendment Act, 1856, s. 14, from the effect of payment of interest by his co-defendants. The contention for the plaintiffs is that, the debt being charged on land, the case falls within s. 8 of the Real Property Limitation Act, 1874, and that with regard to debts so charged that section must be taken to repeal by implication the provisions of the statute of James I., the consequence being that the defendant Lewis would not come within the protection of the Mercantile Law Amendment Act, 1856, s. 14: *In re Frisby*. (2) But the Real Property Limitation Act, 1874, s. 8, cannot be construed as repealing the statute 21 James I. with regard to simple contract debts charged on land. The section does not say that an action to recover money charged upon land may be brought within twelve years, but that it may not be brought after that period. This provision is not inconsistent with the provisions of the statute of James I., by which actions for simple contract debts must be brought within six years.

[They cited *Sutton* v. *Sutton* (3); *Firth* v. *Slingsby* (4); *Toplis* v. *Baker* (5); *Brocklehurst* v. *Jessop*. (6)]

Dickens, Q.C., and *H. Manisty*, for the plaintiffs. The provisions of the statute of James I. are by necessary implication repealed by the Real Property Limitation Act, 1874, s. 8, as regards debts secured on land. The object of the Real Property Limitation Acts was to provide a complete code as to the periods of limitation for actions in respect of real property and sums of money secured by a charge thereon. Prior to the decision in *Sutton* v. *Sutton* (3) it had been supposed that s. 8 of the Real Property Limitation Act, 1874, only applied to

(1) [1898] 2 Q. B. 223, where the facts are more fully set out.
(2) (1889) 43 Ch. D. 106.
(3) 22 Ch. D. 511.
(4) (1888) 58 L. T. 481.
(5) (1789) 2 Cox, 118.
(6) (1835) 7 Sim. 438.

actions or other proceedings by which it was sought to enforce the charge upon the land, but it was held in that case that the section applied to the personal remedy upon the covenant in a mortgage deed. It would be inconsistent that there should be different periods of limitation provided with regard to the same class of debt by different statutes. There is nothing in *Sutton* v. *Sutton* (1) to indicate that s. 8 of the Act of 1874 does not apply to every action to recover money charged on land. The section does not, indicating the period of limitation, use the word "after" the period named; it says no action is to be brought "but within" the period. No doubt a statute of limitations is a disabling statute; but it may, and has in this case, given a time within which the remedy may be available. When *Toplis* v. *Baker* (2) was decided there was only one statute of limitations, so that the question now raised did not arise.

[They cited *In re Stephens.* (3)]

A. L. SMITH L.J. There is no controversy in this case as to the facts. The action was brought upon a simple contract debt. The loan was secured by a charge on land, and the action was not brought within six years after the right of action first accrued. The question is whether the Real Property Limitation Acts, 1833 and 1874, have repealed the provisions of 21 Jac. 1, c. 16, s. 3, which allows a debtor, in cases where the creditor has slept on his rights for six years, to set up the statute as an answer to the claim made against him. It is clear that the statute of James was passed in favour of debtors, because by it they were allowed to plead the lapse of six years as a bar to an action. Where is to be found, in the statutes of William IV. and of the Queen, that this right is taken away? I cannot find anything to that effect; and, in my opinion, the case of a simple contract debt is not affected by the later statutes. The Real Property Limitation Act, 1833, enacted that no action or suit should be brought to recover any sum of money charged upon land "but within

(1) 22 Ch. D. 511.
(2) 2 Cox, 118.
(3) (1889) 43 Ch. D. 39.

C. A. 1899

BARNES v. GLENTON.

A. L. Smith L.J.

twenty years" after the right of action has accrued. That, upon the face of it, means the right to bring an action of the class enumerated in the section. Where in that section is there anything to be found as to actions for simple contract debts, to which, I may point out, the statute of James is limited? I need not refer to the Real Property Limitation Act, 1874, because its effect is only to cut down the period of twenty years to a period of twelve years. Then it is said that *Sutton* v. *Sutton* (1) shews that the rights under the statute of James have been altered by the subsequent Acts. In that case it was held that the limitation of twelve years imposed by the Act of 1874 on actions to recover money charged on land applied to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. That decision is binding on us, but it does not cover the case of a simple contract debt. Some detached statements of the Master of the Rolls and Bowen L.J. were pressed on us to shew that even a simple contract debt comes within s. 40 of the Act of William IV.; but it is sufficient to say that the passages refer to the case of a covenant with which the Court was dealing, and not to a case of a simple contract debt which was not before them. What other authorities are there? *Toplis* v. *Baker* (2) is against the argument advanced on behalf of the plaintiffs. *In re Stephens* (3) is, as far as it goes, also against that argument, because Kay J. dealt with the statute of James as still existing, but said that as the debt was charged on the testator's real estate the claim was not barred by the lapse of six years. In *Firth* v. *Slingsby* (4) Stirling J. decided this very point—that in such a case as the present the debtor was entitled to set up the statute of James as an answer. The text-books, as a rule, are to the same effect.

The Lord Chief Justice seems to have been led into an erroneous view of the case because the main argument was directed to the point whether the money was charged upon the land. No case appears to have been cited except *Sutton* v. *Sutton* (1), and he came to the conclusion upon some of the

(1) 22 Ch. D. 511.
(2) 2 Cox, 118.
(3) 43 Ch. D. 39.
(4) 58 L. T. 481.

observations in that case that he ought to hold that the claim, though on a simple contract debt, came within the statute of 1874. For the reasons I have given I think the judgment cannot be supported, and that the appeal must be allowed.

COLLINS L.J. I am of the same opinion. The action is on a simple contract debt which is also charged on land, and the argument for the plaintiff is that under s. 8 of the Act of 1874 the period of limitation of that section now governs all claims, personal or against the land, where the debt is charged on land.

In order to appreciate the point, it is necessary to see how the law stood before the Act of William IV., for the Act of 1874 only cuts down the period named in the earlier Act. Under the statute of James, in case of a simple contract debt, the period of limitation was six years. At the time the statute of William IV. was passed the claim of a creditor was barred on a simple contract debt after six years. That Act was passed to cut down and not to extend the rights of creditors. In a compendious section, which I will assume is large enough to embrace a simple contract to pay a sum charged on land, it limits to twenty years the period in which all proceedings covered by the section must be brought. But a certain class of the proceedings covered are already subject to the six years' limitation of the Act of James. How can the later enactment, by imposing a limitation of twenty years over a larger area, enlarge the period already defined as the limitation for a particular part of that area, namely, simple contracts? The words of the section debar the creditor from proceeding after twenty years; they do not confer any right of suit upon him which he did not before possess. The statutory prohibition against taking proceedings after the period named is not a statutory permission given to take them within that period, and it does not remove the existing fetter imposed in the case of simple contracts by the Act of James. The debtor is entitled to the benefit of either Act whenever the case falls within it.

It is said that *Sutton* v. *Sutton* (1) altered the law; but that case has no bearing on the point before us. All it decided was

(1) 22 Ch. D. 511.

C. A. 1899

BARNES v. GLENTON.

Collins L.J.

that s. 8 of the Act of 1874, which corresponds to s. 40 of the Act of 1833, embraces the personal remedy on the covenant of the debtor as well as the remedy against the land on which the debt is secured. Assuming that the Act applies to simple contract debts, its effect is to impose a fetter over an extended area, not to remove an existing fetter. This is emphasized by the express words of the later Act, the object of which is stated to be further to limit the time within which actions or suits may be brought for the recovery of land or rent, or of charges thereon. The matter was summed up by Stirling J. in *Firth* v. *Slingsby* (1), in which case he pointed out that the last-named statute was not in any sense an enabling statute, but that its language was entirely prohibitory. The opposite of that proposition underlies the argument placed before us on behalf of the plaintiffs. I agree, therefore, that the appeal must be allowed.

ROMER L.J. I am also of opinion that the appeal should be allowed. This is an action to enforce payment of a simple contract debt charged upon land. The point is whether the defendant can plead the statute 21 Jac. 1, c. 16, as a defence. Consider how matters stood prior to the statute 3 & 4 Will. 4, c. 27. If an action was brought on a simple contract debt the statute of James could be pleaded. The money sought to be recovered, though charged on land, could not be enforced, against the person who had undertaken to pay it, after the expiration of six years; but the remedy against the land would not have been barred under that statute. There could, therefore, have been a case in which the personal remedy was barred, but not the remedy against the land. That this was the position of things is clear from the cases of *Toplis* v. *Baker* (2) and *Brocklehurst* v. *Jessop*. (3) Then came the statute of William IV., altered as to the period of limitation by the statute of 1874, though in other respects the two statutes may practically, for present purposes, be treated as one. Since the case of *Sutton* v. *Sutton* (4) it must be admitted that s. 40

(1) 58 L. T. 481.
(2) 2 Cox, 118.
(3) 7 Sim. 438.
(4) 22 Ch. D. 511.

of the statute of William IV. is not confined to actions where the remedy is against the land, but includes also the personal remedy on the covenant to pay. Except so far as it decides that point, the case has no bearing on that which is before us. Now it is to be observed that the Acts of William IV. and of 1874 were not intended to take away from debtors any rights, or to give any additional rights to creditors. On the contrary, the intention was to give further rights to debtors to oppose the claims of creditors after the lapse of a certain time. The statutes do not say that debts may be recovered under certain conditions, but they negative the rights of creditors to bring actions after a certain time has elapsed. They were not intended to repeal the statute of James, and do not repeal it, so far as relates to simple contract debts charged on land, either expressly or impliedly. These two statutes and the statute of James are general, and have a wide operation, and they can well stand together. There would be no difficulty in framing a provision which would comprise the material provisions of the statutes so far as concerns the question before us. The effect of such combination may be stated briefly thus: "No action to enforce a simple contract debt, whether charged on land or not so charged, shall be brought after six years, unless interest has been paid or an acknowledgment given, and as to any debt charged on land, even if the debt be a specialty debt, no action shall be brought for a remedy against the land after twelve years unless interest has been paid or an acknowledgment given." This substantially represents the joint operation of the Acts, and shews that they in no way conflict. It follows that a defendant has, in a proper case, the right to resort to either of the statutes.

Appeal allowed.

Solicitors for plaintiffs: *Maudes & Tunnicliffe.*
Solicitors for defendant Lewis: *Calkin Lewis & Stokes.*

A. M.

1899
April 13.

BROWN, Appellant; PATCH, Respondent.

Gaming—Betting—Defined Place where Betting carried on—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The respondent, a bookmaker, and his clerk entered inclosed grounds in which horse-races were being carried on, and put up a cane structure about five feet high with four legs or supports, and having on the top a board on which were painted the words "Bob Patch" (the respondent's name), "London. All in run or not—pay first past the post." Before each race the odds offered by the respondent against the various horses running were written on the board. He stood on a box placed close to the structure, and invited people to bet with him; and, assisted by his clerk who stood near, made bets on each race with backers of the horses running:—

Held, on these facts, that the respondent had used a "place for the purpose of betting with persons resorting thereto," within the meaning of 16 & 17 Vict. c. 119, s. 1.

Case stated, under the Summary Jurisdiction Acts, by justices of the county of Dorset, sitting as a court of summary jurisdiction at Blandford in that county.

The respondent, Robert Patch, was summoned on the complaint of the appellant George Brown, an inspector of police of the same county, charging that the respondent, on September 8, 1897, at the parish of Farnham in the same county, being then a person using a certain place, to wit, "a particular part of the inclosure known as 'The Larmer Tree Grounds' within the said parish of Farnham, unlawfully did use the said place for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse and other races."

At the hearing of the complaint the following facts were proved before the justices:—

In the parish of Farnham were certain inclosed grounds known as the "Larmer Tree Grounds." At various times of the year meetings for horse and other races were held in these grounds by permission of the owner.

On September 8, 1897, a race-meeting was held in those grounds at which several thousands of persons were present—among them being some six bookmakers or professional betting

men with their clerks. All these persons, including the bookmakers and their clerks, were admitted without payment to all parts of the grounds.

The respondent was a bookmaker, and he entered the Larmer Tree Grounds with his clerk about 12.30 P.M. on September 8, 1897. The two men erected on the ground a structure of which the following is a description. It was made of bamboo cane with four legs or supports, two in front and two at the back, fastened together in front. It was five or six feet high from the ground to the top. On the top of this structure there was a board on which was painted in gilt letters the words "Bob Patch, London. All in run or not—pay first past the post." Below the board was a canvas screen or banner some distance off the ground, and the words "Bob Patch, London," were on the canvas. The respondent placed a wooden box or stool close to the right-hand side of the structure.

From time to time during the day the respondent stood on the box or stool and shouted the odds against the different horses or bicyclists running in the different races, and invited all persons present to bet with him, and from time to time wrote on the board before referred to the odds offered against the different horses and bicyclists. When a bet was made the backer paid the amount to the respondent, and the respondent or his clerk, who stood by him on the ground, wrote down the bet in a book, and handed the backer a ticket bearing the respondent's name and a number. When a race was over the several persons who had backed the winner returned to the respondent at the aforesaid structure, and the respondent paid to each such person the amount due to him.

During the whole time the racing continued the respondent's structure remained in the position and on the particular part of the grounds in which it was first placed. There was nothing surrounding the structure, whether for the purpose of excluding the public or for any other purpose, and the respondent had no exclusive right of user on any portion of the grounds.

A notice was served on the respondent by a police constable intimating that illegal betting would not be permitted; but the respondent continued betting until the end of the races.

1899

BROWN v. PATCH.

In various parts of the grounds there were some six other bookmakers, who erected structures and stood on boxes or stools like the respondent, and conducted a betting business in the same manner as the respondent.

The justices dismissed the complaint on the ground that the user by the respondent of a portion of the Larmer Tree Grounds in the circumstances aforesaid for the purpose of betting was not a user of a "place" within the meaning of the Betting Act of 1853 (16 & 17 Vict. c. 119). (1)

The question for the opinion of the Court was whether the justices were right in dismissing the complaint of the appellant.

A. Clavell Salter, for the appellant. The justices ought to have convicted the respondent. The case is within the principle of the decisions in *Shaw* v. *Morley* (2), *Bows* v. *Fenwick* (3), and *Liddell* v. *Lofthouse* (4), which have been approved by the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* (5) The test to be applied in determining whether there has been user of a "place" within the meaning of the Act is laid down by the judgments in the House of Lords. There must be a sufficiently defined "place" at which the person accused of an offence under the Act carries on the business of betting with persons resorting thereto for the purpose of betting with him. It is a question of fact and degree in each case; but where, as here, a spot is appropriated

(1) 16 & 17 Vict. c. 119, s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, ... or in any manner conducting the business thereof betting with persons resorting thereto. . . . . and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Sect. 3: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; . . . . and any person . . . . in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable" to a penalty, &c.

(2) (1868) L. R. 3 Ex. 137.

(3) (1874) L. R. 9 C. P. 339.

(4) [1896] 1 Q. B. 295.

(5) [1899] A. C. 143.

by placing a structure with the name of the person who holds himself out as ready to bet with persons who wish to bet with him—with the indicia and paraphernalia of the business of betting—there is a "place" within the Act. That was the test applied in *Snow* v. *Hill* (1), in which it was held that the offence had not been committed. In *Gallaway* v. *Maries* (2) and *Hawke* v. *Dunn* (3), both of which decisions were overruled by *Powell* v. *Kempton Park Racecourse Co.* (4), the facts were wholly different from those in the present case. In *Gallaway* v. *Maries* (2) the person charged merely stood on a box within the inclosure during races, and in *Hawke* v. *Dunn* (3) he was merely betting in the inclosure; and in both cases it was held, wrongly, that he had committed an offence within the Act. In *Powell* v. *Kempton Park Racecourse Co.* (4), also, the facts were wholly different. From the preamble of the Act and from ss. 1 to 5 it is clear that it strikes at the putting of facilities for betting in the way of persons who perhaps, but for those facilities, would not bet.

G. H. Stutfield (*H. S. Cautley*, with him), for the respondent. The justices decided rightly. The facts do not materially differ from those in *Gallaway* v. *Maries*. (2) The structure put up by the respondent here was no more than the stool used there. The true inference is that, as in *Powell* v. *Kempton Park Racecourse Co.* (4), the person charged did not use a defined place for the purpose of betting with persons resorting thereto. To be within the Act the "place" must have a boundary; it must be ejusdem generis with "house, office, or room," though it need not be a brick building or have a roof. The only "place" here was the whole inclosure, so that the case is governed by *Powell* v. *Kempton Park Racecourse Co.* (4) Sect. 11 of the Act, which authorizes a search of suspected houses, offices, rooms, or places, shews that there must be some kind of inclosure—some place of defined dimensions to which numbers of persons may resort. In *Liddell* v. *Lofthouse* (5) there was such an inclosure. *Shaw* v. *Morley* (6) and

(1) (1885) 14 Q. B. D. 588.
(2) (1881) 8 Q. B. D. 275.
(3) [1897] 1 Q. B. 579.
(4) [1899] A. C. 143.
(5) [1896] 1 Q. B. 295.
(6) L. R. 3 Ex. 137.

1899

BROWN v. PATCH.

Bows v. *Fenwick* (1) were decided on different facts, and do not conclude this case.

DARLING J. In this case proceedings were taken against the respondent under the Betting Houses Act of 1853. He was charged under s. 1 of that Act, which makes it unlawful for a person to keep or use a house, office, room, or other place for the purpose of the person keeping or using it betting with persons resorting thereto. The respondent is a bookmaker, and the facts with respect to what he did are thus stated in the case. [The learned judge stated the facts as set out in the case.] Upon those facts it was argued before us that the betting was an offence prohibited by the statute, because it had been carried on by a person who kept this place, and used it for the purpose of betting with people who might resort thereto. It was said, on the other hand, that the magistrates were right in holding that this was not a place within the meaning of the Act by reason of the various decisions which have been already given upon the statute. Quite lately, however, *Powell* v. *Kempton Park Racecourse Co.* (2) has been decided by the House of Lords, and in that case all the decisions which have been referred to were reviewed, with the result that certain of them have emerged as good law, and among them the cases of *Shaw* v. *Morley* (3), *Bowes* v. *Fenwick* (1), and *Liddell* v. *Lofthouse* (4), which are relied on for the appellant in the present case. In considering whether this can, or cannot, be a "place" within the Act, I wish to refer to what has been laid down by the House of Lords in *Powell* v. *Kempton Park Racecourse Co.* (2) Lord James of Hereford said (5): "In order to bring the first clause into operation something must exist that can at least constructively be regarded as a common gaming-house." Further he said (6): "Speaking in general terms, whilst the place mentioned in the Act must be to some extent ejusdem generis with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be

(1) L. R. 9 C. P. 339.
(2) [1899] A. C. 143.
(3) L. R. 3 Ex. 137.
(4) [1896] 1 Q. B. 295.
(5) [1899] A. C. at p. 193.
(6) [1899] A. C. at p. 194.

covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word 'place' . . . . directly a definite localisation of the business of betting is effected, be it under a tent or even movable umbrella, it may be well held that a 'place' exists for the purposes of a conviction under the Act." The Lord Chancellor used these words (1): "I do not think, therefore, that the important question is, what is a 'place'? I think in this respect with Rigby L.J. that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the statute. But I think not only that this is the construction of the words, to which, of course, we must apply the meaning which the Legislature has intended, if we can find it out, but I think it is reasonable and in accordance with good sense that the words should be so construed and so limited." One of the noble Lords, therefore, says that there must be a definite localisation of the business of betting, and the Lord Chancellor says that, in order to satisfy the statute, there must be a place which is sufficiently definite in which a betting establishment might be conducted. Now I am not going to attempt, nor is it necessary to attempt, to give a definition of what is or is not a "place." We have to consider, having regard to the law as laid down in the judgments I have referred to, whether we can say that the magistrates, on the facts proved and stated in the case, should have drawn the inference that this was a "place," within the meaning of the Act, in the sense that it was sufficiently definite as a place where betting could be conducted, or that there was a definite localisation there of the business of betting. I think that there was. I think it is sufficient to satisfy the statute if, as in this case, a man who was admittedly going to bet with any persons who might come and bet with him, had localised his business for the purpose of betting in the spot which he had selected for the purpose of carrying on his business, and that, if he localised his business there, he did for the time convert that spot into a "place" within the meaning of the Act. It is not necessary that the "place" should be

(1) [1899] A. C. at p. 162.

1899

BROWN v. PATCH.

Darling J.

roofed, or have exact limits and fixed boundaries. In the present case the respondent put up a structure with four posts to announce that he, giving his name, could carry on business, what his business was, and the terms on which he was prepared to bet with people who might come to him, and there he and his clerk stood. He put a stool or box close to the advertisement he had fixed up, and there he stood, and there he carried on his business. In my judgment that was a definite localisation of the business of betting. There was a sufficiently defined place in which the betting was conducted. I therefore draw the inference that this was a place within the meaning of the Betting Houses Act of 1853, and I think that the magistrates ought to have drawn that inference also. As I have said, I shall not attempt to give any definition of what is or is not a "place." I will only say that the word "place" as used in this statute does not mean what the respondent's counsel contended it must mean—namely, a limited, staked out, or fixed structure with limits absolutely defined, and fixed for any definite time. The words of the statute are simply "a place," and cannot be so limited. In my view there was a sufficient localisation of the business of betting to convert the spot where it was definitely localised for the time being into a "place" within the Act; and upon that ground I come to the conclusion that the respondent ought to have been convicted.

CHANNELL J. I have come to the same conclusion. The law has now been fairly well settled by the decision of the House of Lords in the *Kempton Park Case*. (1) I think there is no difficulty in understanding what is the law and what is the interpretation of the statute; but there is considerable difficulty in applying it in particular cases. The statute seems clearly to be directed against betting places, not against betting persons. Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with any one who will bet with you. But it does

(1) [1899] A. C. 143.

forbid carrying on the business of keeping an office or place to which people may come and bet with you. The judgments in the case in the House of Lords clearly shew that that is the matter to be considered. The important question is not so much, what is a place? but what is the character of the user of it? and although the words used are "house, office, room, or other place," and it is clear that, according to the ordinary rule, "place" must be something ejusdem generis with "house, office, room," yet the analogy is with respect to the way the place is used rather than with respect to the way in which it is constructed. I think those propositions are clearly brought out in the judgments delivered in the House of Lords, and especially in the passages in the judgments of the Lord Chancellor and of Lord James of Hereford to which my brother Darling has referred. If a man, as was done here, uses certain apparatus with his name on it, and a statement of the odds he is prepared to lay, that apparatus may be used only to indicate his identity, and that he is willing to bet with anybody who will bet with him. If the apparatus is used for those purposes only, it does not in any way localise his business of betting, or bring him within the provisions of the Act. But if it be used to indicate the place at which there is a man to be found who will bet with any one who will come and bet with him there, then that apparatus becomes an extremely important and valuable matter to consider. In each case the facts must be looked at to see whether the bamboo stage, or the umbrella, or whatever it is that the man has got, is being used by him merely to indicate that he is prepared to bet with anybody who will bet with him, or whether he is using it to indicate that there is a place at which the business of betting is carried on by him, and to which, therefore, people can go for the purpose of betting with him. With respect to the decisions which have been cited to us, the question in each case being, what is the proper inference to be drawn from the particular facts? although it is useful and valuable to see what inferences learned judges have drawn from particular facts in cases which have come before them, their decisions are not quite like binding decisions on a point of law. The question, after all, is

1899

BROWN v. PATCH.

Channell J.

a question of fact in each case—whether you come to the conclusion that there has been a user of a place, analogous to the user of a place like a betting office, at which the person who keeps or uses that place is prepared to bet with people who come there and bet with him. In the present case I think the facts are sufficient to bring it within the statute, and that the inference ought to be drawn that what the respondent did was not merely indicating that he was a man prepared to bet with anybody who would bet with him, but it was indicating that he was using that place as a place where he could be found and was carrying on his business. He was localising his business there, with the object of attracting people there, and to prevent them from having to look for him all over the grounds. If that inference be drawn, this case is clearly brought within the principle of the decisions which have been held by the House of Lords to be good. Guided very considerably, of course, by the views taken by the judges who decided *Shaw* v. *Morley* (1) and *Bows* v. *Fenwick* (2), I come to the conclusion upon the facts of this case that the inference ought to be drawn that the respondent's business was localised, and that consequently he was brought within the terms of the statute. Upon these grounds I am of opinion that the magistrates ought to have convicted, and that the case should be sent back with a direction that they ought to convict.

Judgment for the appellant.
Case sent back to convict.

Solicitors for appellant: *Robins, Hay, Waters & Hay, for Ffooks & Douglas, Sherborne.*

Solicitors for respondent: *Lumley & Lumley.*

(1) L. R. 3 Ex. 137. (2) L. R. 9 C. P. 339.

W. A.

BASTER *v.* LONDON AND COUNTY PRINTING WORKS.

1899
April 25.

Master and Servant—Contract—Dismissal—Misconduct of Servant—Workman—Forgetfulness.

A single instance of forgetfulness by a servant, by reason of which damage is caused to a valuable machine of which he has the care and management, may constitute such neglect of duty as to justify his master in dismissing him without notice.

CASE stated by one of the metropolitan police magistrates sitting at the Bow Street Police Court.

At the hearing of a complaint made by the appellant, a workman, claiming two weeks' wages from the respondents, the following facts were proved before the magistrate:—

The appellant was employed by the respondents, and was engaged in the care and management of a printing press of the value of 800*l.* used in the respondents' printing business. Whilst so engaged, a roller known as the "toprider" jammed under the cylinder, doing damage to the machine to the extent of 30*l.* Upon being asked by the respondents' manager for an explanation of the cause of the accident, the appellant stated that the "toprider" had jumped out of the forks in which it should revolve. The manager, believing that the accident was due to the appellant's want of care, and that he had caused it by neglecting to place one end of the "toprider" in the forks before he started the machine, as it was his duty to do, paid the appellant his wages up to that day, and dismissed him without notice.

The magistrate was satisfied upon the evidence "that the only way in which the accident could have occurred was by the appellant's forgetfulness to fix the end of the 'toprider' in the forks before starting the machine, notwithstanding the appellant's own strong belief that he had done so," and held that such forgetfulness in the performance of an important

1899

BASTER v. LONDON AND COUNTY PRINTING WORKS.

part of the appellant's duty amounted to neglect which justified his dismissal without notice.

The question for the opinion of the Court was whether, under the circumstances, the magistrate was right in so holding.

W. M. Thompson, for the appellant. There was no evidence upon which the magistrate could properly find that the dismissal of the appellant was justified. Innocent forgetfulness is not neglect of duty justifying dismissal without notice; and, if it were, a single act of neglect is not sufficient; the neglect must be habitual or repeated: *Callo* v. *Brouncker* (1); *Edwards* v. *Levy*. (2) In *Fillieul* v. *Armstrong* (3), where a schoolmaster did not return to his employment after the holidays, it was held that, in the absence of moral misconduct, the master was not justified in dismissing him without notice. In modern times the introduction of complicated and expensive machinery has rendered the duties of servants who have to manage it more difficult, and the possible consequences of forgetfulness or mistake on their part more serious; but they ought not, on that account, to be treated with less leniency than before, and there is no authority for saying that they should be so treated.

W. F. Colam, for the respondents. It is true that there is no modern authority on the point raised. The question is one of fact and degree in each case. The cases cited for the appellant are only decisions on the particular facts. Where the servant's conduct is such as goes to the root of the contract of employment, and it would manifestly be injurious to the master's interest to retain him in the employment, the master is justified in dismissing him without notice. Under modern conditions a single instance of forgetfulness may result in serious injury to a master whose servant is employed to manage expensive machines. There was evidence here upon which the magistrate could come to the conclusion that the dismissal was justified.

(1) (1831) 4 C. & P. 518. (2) (1860) 2 F. & F. 94.
(3) (1837) 7 Ad. & E. 557.

1899

BASTER v. LONDON AND COUNTY PRINTING WORKS.

DARLING J. I am of opinion that the magistrate was right in his decision. [The learned judge referred to the facts stated in the case and to the magistrate's finding.] It was argued on behalf of the appellant that mere forgetfulness could not amount to neglect; but I think that to forget to do a thing which it is of great importance you should remember may well shew such a careless regard to your master's interest as amounts to neglect. Neglect as often arises from forgetfulness as from anything else; and, if the forgetfulness is with respect to an important thing it may well, in my view, be good ground for dismissal of the servant without notice. I do not say that it would be good ground for dismissal in every case. Some trivial acts of forgetfulness might not even justify a complaint or remark; but to forget to do a thing which, if not done, may cause considerable damage to the master, or to his property, or to fellow-servants, may be a serious neglect of duty. Take the case of a signalman on a railway who does not put the signal at danger when he ought to do so. Nobody would suggest that his omission was the result of anything but forgetfulness; but could it be said, in view of what might be the consequences, that it was not a serious neglect of his duty? It was argued that forgetfulness is not neglect unless it is habitual; but how can any rule be laid down as to how many times—once, twice, or more—a man may forget before his conduct amounts to neglect justifying dismissal? The line cannot be drawn; the question must depend upon the particular circumstances of each case. In the case before us the machine was worth 800*l.*, and the appellant's forgetfulness caused damage to the amount of 30*l.* I think there was evidence of neglect to justify his dismissal. It was said that complicated machinery had been introduced in modern times, and that forgetfulness by workmen in charge of it ought to be treated leniently. It is easy to see how dangerous that argument is to workmen themselves. The lives of hundreds of them may be sacrificed because of something done, or not done, in a moment of forgetfulness by a man in charge of machinery. To any one who knows about the working of mines and railways in this country, and remembers that a moment of forgetfulness may

1899

BASTER v. LONDON AND COUNTY PRINTING WORKS.

cost the lives of a hundred men, it is impossible to give weight to the contentions put forward for the appellant—that forgetfulness is not neglect unless it is habitual, and that forgetfulness whilst in charge of complicated machinery should be treated with exceptional leniency.

CHANNELL J. I am of the same opinion. It is quite impossible, and I shall not attempt, to give an exhaustive definition of what is misconduct which justifies dismissal without notice. As to whether a single act would justify dismissal, that depends upon the character of the act and the duties of the man who does it. I cannot say that the magistrate was wrong in the conclusion he came to. I do not say that I should have come to the same conclusion; it is sufficient for us to say that there was ample evidence upon which he might arrive at it. The question is one of fact and degree in all cases.

Judgment for the respondents.

Solicitor for appellant: *George Jolly.*
Solicitors for respondents: *Powell & Skues.*

W. A.

In re RHOADES.
Ex parte RHOADES.

1899
Jan. 23;
March 29.

Bankruptcy—Insolvent Testator—Administration Order—Debt due to Executor—Assets paid to Official Receiver without retaining Debt—Mistake—Repayment — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 4, 5, 9.

The mere fact of payment by an executor to the official receiver of assets collected by the executor does not necessarily bar the executor's right of retainer, any more than payment into court.

Where, therefore, the usual order was made under s. 125 of the Bankruptcy Act, 1883, for administration of the estate of an insolvent testator, and the executrix, who was a creditor of the estate, in ignorance of her right of retainer, paid to the official receiver all the assets she had collected, and then set up her right of retainer, it was *held* that she was entitled to be repaid her debt in full out of the assets in the hands of the official receiver.

THIS was an application which raised the question as to an executor's right of retainer under the following circumstances.

G. W. Rhoades, a trader, died on April 14, 1898, having by his will appointed his wife his executrix, who duly proved the same on June 29, 1898. She proceeded to get in and realize the assets, and paid the moneys she collected into a bank to an account which she opened in her own name. She was a creditor of the estate for money lent by her to her husband amounting to 604*l.* 3*s.* 4*d.*

On July 11 she had notice of a petition under s. 125 of the Bankruptcy Act, 1883, for an order for the administration in bankruptcy of her husband's estate, and at this date there was about 900*l.* standing to her credit at the bank. On July 25 the usual administration order was made, and the official receiver became the trustee. On July 30 the official receiver called upon Mrs. Rhoades to pay over to him the money standing to her credit at the bank, which then amounted to some 1100*l.*, which she at once did, in the belief that she was bound to pay, and in ignorance of her right of retainer.

On August 9 she lodged a proof for her debt, when she ascertained for the first time her right of retainer; and on

1899

RHOADES, *In re.* RHOADES, *Ex parte.*

August 15 she withdrew her proof, before it had been adjudicated upon, and set up her right of retainer. The official receiver declined to recognise her claim of retainer; and thereupon she now applied for a declaration that as executrix she was entitled to exercise her right of retainer in respect of the 604*l.* 3*s.* 4*d.*, and for an order that the official receiver might be directed to pay her the same out of the moneys in his hands.

Reed, Q.C., and *Rolt*, for the motion. This was a voluntary payment by the executrix, made under a mistake of law. The official receiver is an officer of the Court, and the Court will direct him to do what is right: *Ex parte James* (1); *Ex parte Simmonds.* (2) It is not a case of election, because she made her proof in ignorance of her right, and directly she was informed of her right she withdrew her proof before it was adjudicated upon. The right of retainer is not lost by payment into court, and by analogy the principle applies to payment by an executor to the official receiver or trustee, when the money in his hands at the time of payment over is subject to the right of retainer: *In re Williams.* (3)

Whinney, for the trustee. The foundation of the executor's right of retainer is the right to pay himself out of the assets in his hands; but directly he parts with the control or possession of the money his right of retainer is gone: *Burge* v. *Brutton* (4); Williams on Executors, 9th ed. pp. 892, 894. By sub-s. 5 of s. 125 of the Bankruptcy Act, 1883, when the administration order was made the property vested in the official receiver, and Mrs. Rhoades lost her legal right to the property; and then, under sub-s. 9 of the same section, it was too late for her to exercise her right of retainer. The principle of *Ex parte James* (1) does not apply.

Reed, Q.C., in reply, cited *In re Harrison.* (5)

Cur. adv. vult.

(1) (1874) L. R. 9 Ch. 609.
(2) (1885) 16 Q. B. D. 308.
(3) (1891) 8 Morr. 65.
(4) (1843) 2 Hare, 373.
(5) (1886) 32 Ch. D. 395.

1899

RHOADES, *In re.* RHOADES, *Ex parte.*

March 29. WRIGHT J. G. W. Rhoades died insolvent on April 14, 1898. His will was proved on June 29 by his widow and executrix, who was a creditor for 604*l.* 3*s.* 4*d.* She proceeded to get in the estate, and paid the moneys which she collected into a bank in her own name. On July 11 she had notice of a creditor's petition for administration in bankruptcy. On that petition the usual order was made on July 25. On the 30th of the same month the official receiver required her to pay to him the assets which she had collected, and she paid them over; and on August 9 she put in a proof for her claim. She was then for the first time informed by her solicitor that she had a right of retainer; and on August 15 her proof was withdrawn and a claim of retainer was asserted.

The Bankruptcy Act, 1883, s. 125, sub-s. 4, enacts that an order for administration in bankruptcy shall have "the like consequences . . . . as under an administration order made on the petition of a creditor"; and by sub-s. 5, "the property of the debtor shall vest in the official receiver of the Court as trustee thereof, and he shall forthwith proceed to realize and distribute the same." It seems plain from *In re Hubback* (1) and *In re Orme* (2) that the order for administration does not of itself affect the right of retainer. In the former of these cases Fry L.J. said, with reference to a balance order under the Companies Acts, "This order is analogous to the old administration decree and the present administration judgment, a form of judgment which it is notorious does not affect the right of retainer of the executor . . . . it leaves unaffected all the priorities and all the rights which exist in due course of administration." In *In re Williams* (3), the moneys sought to be retained were apparently not received by the executor until after the administration order; and the judgment seems to proceed on that ground (as to which, however, see Williams on Executors, 9th ed. vol. i. p. 886). Nor would, I think, the mere fact of payment into the hands of the official receiver of assets collected by the executor necessarily bar the right of retainer, any more than payment into court: *Stahlschmidt* v. *Lett* (4);

(1) (1884) 29 Ch. D. 934.
(2) (1883) 50 L. T. (N.S.) 51.
(3) 8 Morr. 65.
(4) (1853) 1 Sm. & Giff. 415.

1899

RHOADES, *In re.*

RHOADES, *Ex parte.*

Wright J.

Chissum v. *Dewes* (1); *Tipping* v. *Power* (2); *Richmond* v. *White* (3); or payment to a receiver: *In re Harrison.* (4) If the debt for which the executor claims the right to retain is disputed, as in the present case it was, it would be quite proper that the assets should be handed over to the official receiver, and it would be his duty as trustee for the interested persons to give effect to the right of retainer on proof of the debt. Then was the right of Mrs. Rhoades barred by the fact that the payment over by her to the official receiver of the moneys which she had collected was made without reservation of that right, and in ignorance of its existence? I do not find that any such contention was raised in the cases which I have cited of payment into court or to receivers; and if it was right for her to pay over the money, I do not think that in so doing, without any express reservation of her right of retainer, she can be held to have thereby made any election or waived any right, the facts negativing any intention of that kind. Further, it was held in *Ex parte James* (5) that a payment made to a trustee by an execution creditor under a mistake of law may be the subject of relief by the Court; and it was said that the trustee is an officer of the Court, and holds the money in his hands for equitable distribution according to the direction of the Court; and this decision was followed and extended in *Ex parte Simmonds.* (6) And although it has been often said that retainer is not to be aided where there is no legal right to it, still if there was a legal right to retain, and it has been imperilled by a mere slip through ignorance of a somewhat obscure right, it seems to me that the doctrine of *Ex parte James* (5) may, if necessary, be applied.

Lastly, it is said that the right is barred by the fact that Mrs. Rhoades has proved for her claim. It was held by Lord Chelmsford in *Stammers* v. *Elliott* (7) that the right was barred in a case of bankruptcy where not only had proof been made, but dividends had been received and kept; and several cases

(1) (1828) 5 Russ. 29.
(2) (1842) 1 Hare, 405.
(3) (1879) 12 Ch. D. 361.
(4) 32 Ch. D. 395.
(5) L. R. 9 Ch. 609.
(6) 16 Q. B. D. 308.
(7) (1868) L. R. 3 Ch. 195.

1899

RHOADES, *In re.* RHOADES, *Ex parte.*

Wright J.

(e.g. *Ex parte Downes* (1) and *Ex parte Solomon* (2)) decide that a proof may be an abandonment of securities. But in the present case the proof was withdrawn before adjudication upon it. In *In re Deerhurst* (3) Cave J. says, "there is no doubt that a creditor may withdraw his proof before it has been adjudicated upon," and I have not found any contrary decision. And if Mrs. Rhoades had the right to withdraw her proof, it seems to me that upon withdrawal of it every consequence dependent upon the mere fact of making it ceases. It might have been otherwise if the proof had been made with knowledge of the right of retainer. That might have been a final election to prove, although it could not have been so intended in this case. In the present case there was a mere slip, without any negligence, and there was no delay in retrieving it. I think that the claim ought to be allowed.

Solicitors for Mrs. Rhoades: *Thomsons, Brooks & Danby.*
Solicitors for the official receiver: *Adams & Adams.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.

1899

April 12.

THE QUEEN ON THE PROSECUTION OF J. D. TOMLINSON *v.* THE COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS.

Patent—Opposition to Grant—Right to be heard in Opposition—Interest in Patent—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 11, 95—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 4.

The Patents, Designs, and Trade Marks Act, 1883, s. 11, as amended by the Patents, Designs, and Trade Marks Act, 1888, s. 4, does not confer the right to oppose the grant of a patent, on the ground that the invention has been patented in this country on an application of prior date, upon a person who has no interest in the prior patent or the patent applied for.

APPEAL from a judgment of a Divisional Court discharging a rule for a mandamus to the Comptroller-General of Patents

(1) (1811) 18 Ves. 290. (2) (1821) 1 G. & J. 25.
(3) (1891) 8 Morr. 258.

C. A. 1899

REG. v. COMPTROLLER-GENERAL OF PATENTS.

to hear the prosecutor in opposition to the grant of the patent.

An application was made to the comptroller by Felix Meyer for the grant of a patent for "improvements in power looms for weaving two or more cloths simultaneously." The prosecutor, J. D. Tomlinson, gave notice, at the Patent Office, of opposition to the grant of patent, on the ground that the invention had been patented in this country on two applications of prior date. The prosecutor did not shew that he was interested in the subject-matter of the earlier patents, and the Comptroller-General applied to the Attorney-General under s. 95 of the Patents, Designs, and Trade Marks Act, 1883, for directions as to hearing the prosecutor in opposition to the grant of the patent. (1)

The Attorney-General directed that the prosecutor should not be heard.

A rule nisi was granted by a Divisional Court for a mandamus to the comptroller to hear the prosecutor, and on argument the rule was discharged by Grantham and Kennedy JJ.

The prosecutor appealed.

C. A. Russell, Q.C., and *E. A. Parkyn*, for the prosecutor. Sect. 11 of the Patents, Designs, and Trade Marks Act, 1883, gives a right to "any person" to give notice of opposition to the grant of a patent. (2) There is nothing in the context to

(1) 46 & 47 Vict. c. 57, s. 95: "The comptroller may in any case of doubt or difficulty arising in the administration of this Act, apply to either of the law officers for directions in the matter."

(2) 46 & 47 Vict. c. 57, s. 11: "(1.) Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the Patent Office of opposition to the grant of the patent on the ground of the applicant having obtained the invention from him, or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country on an application of prior date, or on the ground of an examiner having reported to the comptroller that the specification appears to him to comprise the same invention as is comprised in a specification bearing the same or a similar title and accompanying a previous application, but on no other ground.

"(2.) Where such notice is given the comptroller shall give notice of the opposition to the applicant, and shall, on the expiration of those two months, after hearing the applicant

limit the generality of the words "any person." No doubt under sub-s. 3 the opinion of the law officer is made conclusive as to the title of the person opposing the grant to be heard on appeal from the decision of the comptroller, but the words "in the opinion of the law officer entitled to be heard in opposition to the grant" are not to be found in sub-s. 1, and cannot be referred back to that sub-section. The law officers have in various cases declined to hear objectors under sub-s. 3, because they were not interested in the matter; but it is contended that they have no jurisdiction to decide as to the title of an objector to be heard before the comptroller. There are substantial reasons why the Legislature should have intended that before the comptroller any person might oppose the grant, but that no one should be allowed to appeal from the comptroller's decision in favour of the grant, unless in the opinion of the law officer he was entitled to oppose the grant. In the case of a patent which has expired a member of the general public has, in a sense, an interest in opposing a grant of another patent for the same invention, because it is then open to any one to use the invention, which, during the existence of the patent, he was precluded from doing. Therefore it may be reasonable that, at the preliminary stage of the inquiry before the comptroller, any person should be entitled to oppose the grant of a patent on the ground that there has been a previous patent for the same invention, but, when the comptroller has decided in favour of the grant, that the law officers should have a discretion as to who should be allowed to appeal. Sects. 22 and 26 of the Act tend to support the prosecutor's contention as shewing that, where the Act means that a proceeding shall only be taken by a person interested, express provision is made to that effect. By s. 25 any person may enter a caveat against an extension of the patent without reference to his being interested

---

and the person so giving notice, if desirous of being heard, decide on the case, but subject to appeal to the law officer.

"(3.) The law officer shall, if required, hear the applicant and any person so giving notice and being, in the opinion of the law officer, entitled to be heard in opposition to the grant, and shall determine whether the grant ought or ought not to be made."

C.A. 1899

REG. v. COMPTROLLER-GENERAL OF PATENTS.

in the matter. It cannot have been intended by s. 95 of the Act that the law officers should under that section have jurisdiction to deprive a person of a right of opposition to the grant of the patent which is given him by s. 11.

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *H. Sutton*, for the comptroller. It is sought in this case to go back upon what has long been the settled practice in the Patent Office. It is admitted that in the present case the prosecutor is not in any way interested in the question whether the patent should be granted. The application in this case is therefore an attempt to establish the proposition that any member of the general public may raise the question of the novelty of the invention before the comptroller. The result might be very mischievous, for there is no provision by which the comptroller can give costs, and any unscrupulous person might with impunity give notice of opposition to the grant of a patent as a means of levying blackmail on inventors. Sect. 11 was intended not so much to indicate the class of persons who may oppose as the grounds on which opposition might be made. It would be a very anomalous state of things that a different class of persons should be entitled to oppose the grant of the patent before the comptroller from those who are entitled to oppose it before the law officer. The words of sub-s. 3 are not "person being in the opinion of the law officer entitled to appeal," but "person being in the opinion of the law officer entitled to be heard in opposition to the grant." It would follow from the contention for the prosecutor that, of the class of persons entitled to oppose before the comptroller, some would have a right of appeal and some would not. This cannot have been the intention. The scope of the Act is that the law officers should have jurisdiction to decide judicially who is entitled to oppose the grant of a patent.

Of the three grounds of opposition given in s. 11 the first clearly implies a personal interest in the objector. The third was that an examiner has reported against the novelty of the invention; but this has been altered by s. 4 of the Act of 1888 in such a way as also to necessitate personal interest on the part of the objector. This clearly shews the general

intention of the legislation apart from the question whether the law officers are not, under s. 11, sub-s. 3, and s. 95, the sole judges as to who should be heard in opposition. There have been a series of decisions by law officers of the Crown to the effect that only persons interested are competent to oppose the grant of a patent on the ground that there has been a previous grant for the same invention. [They cited on this point *Glossop's Patent* (1); *Heath & Frost's Patent* (2); *Hookham's Patent* (3); *Van Gelder's Patent* (4); *In re Stewart's Application.* (5)]

W. F. Hamilton, appeared for the applicant.

C. A. Russell, Q.C., in reply.

A. L. SMITH L.J. This is an appeal from a judgment of a Divisional Court discharging a rule nisi obtained by the prosecutor, Tomlinson, asking for a mandamus to compel the Comptroller-General of Patents to hear his objection to a patent applied for by one Meyer.

Two facts are undisputed. The one that Tomlinson had no interest in the subject-matter of the patent which was applied for—that he was in fact nothing more nor less than one of the public, and had nothing to do with the patent nor any interest in it. The other fact is that the comptroller was in doubt whether Tomlinson, as one of the public, had a locus standi to oppose the application, as he had no interest in the patent or in any prior patent relating to the same subject-matter. Under these circumstances, the comptroller brought into play s. 95 of the Patents, Designs, and Trade Marks Act, 1883, and applied to the Attorney-General for directions in the matter.

I wish to say a word or two about the position of the Attorney-General, because in my judgment it is of importance in this case, and his position appears likely to be lost sight of. Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide.

(1) (1884) Griffin's Pat. Cas. 285.
(2) (1886) Griffin's Pat. Cas. 288.
(3) (1886) Griffin's Additional Pat. Cas. 32.
(4) (1888) 6 Rep. Pat. Cas. 22.
(5) (1896) 13 Rep. Pat. Cas. 627.

C. A. 1899

REG. v. COMPTROLLER-GENERAL OF PATENTS.

A. L. Smith L.J.

For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the Attorney-General in exercising judicial functions. Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control. Another case is that of a criminal information at the suit of the Attorney-General—a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the Attorney-General, and no one can set such an information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to shew the high judicial functions which the Attorney-General performs. There is one other matter to which I will refer before I come to the facts of this case. In *Van Gelder's Patent* (1) the position of the Attorney-General in these matters is stated in the judgments in the Divisional Court and in the Court of Appeal. I will read a passage from the judgment of Bowen L.J.: "At common law, the Attorney-General is, when he is exercising his functions as an officer of the Crown, in no case that I know of a court in the ordinary sense." It follows that his decisions, when exercising such functions, were not subject to review by the Court of Queen's Bench, and are not now subject to review by the Queen's Bench Division or this Court.

Turning to the Acts relating to the matter before us, the Patents, Designs, and Trade Marks Act, 1883, and the Amendment Act of 1888, it appears to me that the ultimate court of appeal in matters relating to the granting of patents and opposition to such grants is one of the law officers of the Crown.

(1) 6 Rep. Pat. Cas. 22.

This case has come before the Attorney-General, and we are asked to grant in our discretion a writ of mandamus overruling his decision. The prosecutor went to the Comptroller-General as one of the public with no interest in the patent, and wished to oppose the application for the grant. Now s. 95 was inserted in the Act to give the comptroller power to ask for directions when he is in doubt as to the course he should take in these patent matters. The comptroller is expressly empowered by that section to go to the Attorney-General in any case of doubt or difficulty, arising in the administration of any of the provisions of the Act, for directions as to what is to be done. The hearing or non-hearing of any person in opposition to a grant is clearly a proceeding arising in the administration of the provisions of the Act. The comptroller had a doubt as to whether he should hear the prosecutor, and he applied for directions, and the Attorney-General has directed that the prosecutor should not be heard. In these circumstances an application for a prerogative writ of mandamus is made to compel the comptroller to do that which the Attorney-General has said he ought not to do. That alone is a sufficient ground on which the rule for the issue of this discretionary writ should be discharged.

There is another ground on which in my judgment the rule should be discharged. There has been an argument as to the meaning of s. 11 of the Act. I am not going to say that there are not two possible constructions which can be placed on that section; but we have to say what is the true construction. In my opinion it is that a person having no interest in the subject-matter of a patent is not entitled as of right to be heard in opposition to the grant. It is true that s. 11 commences with the words "any person," and if that were all it would mean every person, whether interested or not. But the section does not stop there, for it gives the grounds on which notice of opposition may be given. The first is that the applicant has obtained the invention from the objector, or from a person of whom he is the legal representative. That clearly points to an objector who has an interest, and to that extent is a limitation of the generality of the words "any person."

C. A.
1899

REG.
v.
COMPTROLLER-GENERAL OF PATENTS.

A. L. Smith L.J.

Then comes the ground, wedged in between the first and third grounds, that the invention has been patented in this country on an application of prior date. That is relied on as giving the right to object to any person, whether interested or not. I do not read it so, but I will return to this later on.

The third ground is that an examiner has reported that the specification appears to him to comprise the same invention as is comprised in a specification bearing the same or a similar title and accompanying a previous application. That in itself throws no light on the interpretation of the words "any person," because the examiner reports proprio motu. But the Legislature in 1888, by s. 4 of the Patents, Designs, and Trade Marks Act of that year (51 & 52 Vict. c. 50), cut this third ground out of s. 11, and enacted this in its place: "on the ground that the complete specification describes or claims an invention other than that described in the provisional specification, and that such invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification." This plainly brings in the interest of the person who makes opposition, so that the power to intervene is cut down to a person having an interest. In my opinion, the first and third class of objection being confined to objections by a person having an interest, the intermediate clause has the same effect, and was not intended to give a right to every member of the public to oppose, but only to give it to persons having an interest in the subject-matter. I think the Attorney-General puts the right construction on this clause when he says that it refers to the patenting of the invention, at a prior date, by the person who opposes the grant. Sub-s. 2 of s. 11 does not carry this matter further, but sub-s. 3 gives authority to the law officer to hear, on an appeal against the decision of the comptroller, any person who, in the opinion of the law officer, is entitled to be heard in opposition to the grant. It is idle to argue that the Court should grant a mandamus to the comptroller to hear an objector when a power is given to the law officer to determine whether the objector is a person entitled to be heard. I need not go through s. 18, which relates to applications to amend a specifi-

cation; it is sufficient to say that sub-s. 4 also leaves it to the law officer to determine whether the person giving notice is entitled to be heard. It seems to me, reading the two Acts of 1883 and 1888 together, that the prosecutor's contention is ill-founded.

There is another matter to which I will refer, and I do not think that in doing so I am transgressing any rule relating to the interpretation of statutes. It is well established that nothing said in Parliament can be referred to in a court of law as to the meaning of an Act, and that is a rule that no one can be more jealous than myself to uphold. But here we find Sir Farrer Herschell, who was Solicitor-General when the Act of 1883 passed, when sitting as a law officer, and adjudicating on the very point that is now before us, in *Glossop's Patent* (1) in the following year saying as follows: "I shall hesitate very much before I say that any member of the public can come in and oppose a patent, and raise an inquiry and cause an appeal of this sort, who has no interest in it, and who simply says, 'Do not ask me what my interest is, because I have none, except that I am going to shew you that this patent is the same as that.' Because that system might be used so as to cause a vast amount of annoyance and expense of a most objectionable character to patentees. I know it was intended to prevent that, and I say I should hesitate very much before I permitted it, and therefore I think your case had better be rested not on that ground," but, if at all, on another special ground.

I give my own construction to the Act independently of this expression of opinion, but I think it confirms my view to shew that it was also that of so great an authority as Sir Farrer Herschell, sitting judicially as Solicitor-General. There are also other opinions of the law officers, but I will only refer to one, that of the present Attorney-General in *In re Stewart's Application* (2), in which he expressed the same view that I take, which is in accordance with the practice for many years past.

For these reasons I think the rule for a mandamus was properly discharged, and that this appeal should be dismissed.

(1) Griffin's Pat. Cas. 285. (2) 13 Rep. Pat. Cas. 627.

C. A. 1899

REG. v. COMPTROLLER-GENERAL OF PATENTS.

COLLINS L.J. I am of the same opinion. I think that when s. 11 is read as a whole, some limitation must be placed on the generality of the words "any person," and on reading sub-s. 3 it seems clear to me that there is such a limitation, and that a law officer is the only person who can determine what that limitation is. As I read the section, it is not every person who is to be entitled to object, but persons having a certain status, and it indicates that there must be something in that status shewing a right to be heard. Whether that status exists is a question for the law officer of the Crown to determine. It is suggested that, though this may be true as applying to a hearing before a law officer, it is not so as applying to a hearing before the comptroller. The answer seems to me to be that the Legislature could not have intended anything so anomalous as that. The question that the law officer has to decide is whether the person who desires to oppose the grant is entitled to be heard. The grant is made by the comptroller, so that the opinion of the law officer is not confined to the right of an individual to be heard before him on appeal. This view is certainly fortified by the alterations made in this Act by the subsequent Amending Act of 1888. One of the original grounds of objection to a grant was that an examiner, a neutral person, but specially qualified to deal with the matter, had reported against the novelty of the invention. That provision has been struck out; but it is said that though this has been done, the comptroller is bound to entertain an objection of the same kind coming from a person not specially trained, and not necessarily neutral, and who ex hypothesi has no interest in the matter. That would be a strange condition of things, and the change seems to me to indicate the intention of the Legislature that there should be underlying all these applications a personal right on the part of the person claiming to oppose, and of the existence of that right the Attorney-General is to be sole arbiter. I would further point out that the mandamus asked for is a discretionary writ, and that it should be refused is conclusively shewn by this consideration—that it is not asked for to control any exercise of discretion on the part of the comptroller, for we know that he asked for and

obtained directions on the matter from the Attorney-General. In view of these directions by the authority charged with giving them, and of the fact that they were acted on by the comptroller, it is impossible to say that this is a case in which the prayer for a writ of mandamus should be granted. For these reasons, and for those given by my Lord, I am clearly of opinion that the appeal should be dismissed.

ROMER L.J. I also think that this appeal should be dismissed, and for the reasons that have been given; but I will add a few words as to the construction of s. 11. I will go so far as to say that at first sight it would appear as if the phrase "any person" was unlimited so far as the particular ground of objection—that the invention had been patented in this country on a prior application—is concerned. On closer inspection this view appears to be erroneous. The words in sub-s. 3 which point out that the law officer is entitled, on appeals before him, to decide who may be heard in opposition to the grant, shew to my mind that it is not every person who is entitled to be so heard. The words "in opposition to the grant" are important. They do not say, and I do not think they mean, entitled to be heard merely on the appeal before the law officer, but they are more general in their effect. and to my mind they shew that it is not every one who is to be entitled to be heard in opposition generally, and, if so, this covers the case of a hearing before the comptroller. It may be said that a difficulty might arise if the law officer is to determine whether or not any person is to be heard in opposition to the grant, because the application is not before him, but before the comptroller; but that difficulty is met by the provision of s. 95 that the comptroller may, in administering the Act, apply in cases of difficulty to the law officer for his direction. That enables the comptroller, directly any matter, such as a question of opposition to a grant, comes before him, to go at once to the law officer and get his direction, as was done in this case. It is almost impossible to suppose that the opposite construction sought to be put on s. 11 could have been intended, and that, before the question of the right of a

C. A. 1899

REG. v. COMPTROLLER-GENERAL OF PATENTS.

ROMER L.J.

particular person to object can be determined, the form of going before the comptroller and getting his decision must be gone through, merely in order that there may be an appeal to the law officer, and an opportunity for him to determine that the objector never ought to have been heard. It is equally difficult to imagine that before the comptroller and on appeal to the law officer different persons should have the right to be heard, especially as the appeal to the law officer is of necessity a more important hearing than that before the comptroller. I wish to add that the construction we are putting on s. 11 is to my mind more reasonable and convenient than that suggested on behalf of the prosecutor. It must be remembered, also, that there is no hardship involved in this construction, because the sealing of a patent does not establish its validity, but leaves it open to any one to shew, upon proper and sufficient grounds, that the patent is invalid, and there are provisions under which persons who are more distinctly interested can apply for the revocation of a patent which has been improperly granted.

Appeal dismissed.

Solicitors for prosecutor: *Radford & Frankland.*
Solicitor for defendant: *Solicitor to the Board of Trade.*
Solicitors for patentee: *Wilson, Bristows & Carpmael.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
April 24.

THE QUEEN ON THE PROSECUTION OF H. E. WALKER & A. C. WALKER (TRADING AS THE RUGBY PORTLAND CEMENT COMPANY) *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Minerals—Notice of Intention to Work—Compensation—Repeal of prior Act—Reservation of Rights—Arbitration—Duty of Company to take up Award—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 35—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

By a special Act a number of railway companies were dissolved and consolidated into a new company, and the Acts relating to the dissolved companies were repealed. The special Act incorporated the Railways Clauses Consolidation Act, 1845, which was to apply to the new company as if the railways made under the repealed Acts had been made under the powers and provisions of the Railways Clauses Consolidation Act, 1845, and as if that Act had been expressly made applicable to those railways, and as if those railways had been authorized to be made under the special Act. There was a proviso that the repeal should not prejudice or affect anything done under the repealed Acts, or, except as in the repealing Act specially provided, affect the rights of any persons, under the repealed Acts, to which but for the repeal they would have been entitled.

Owners of minerals, lying under and near a part of the railway which had belonged to one of the dissolved companies, gave notice of their desire to work those minerals. An arbitration was held under s. 35 of the Lands Clauses Consolidation Act, 1845, to assess the amount of compensation to be paid to the owners of the minerals. The company attended the arbitration under protest, and contended that, by virtue of the proviso in their Act, the assessment should be made under the Act of the dissolved company, and not under the Railways Clauses Consolidation Act, 1845. The arbitrator made his award, which the company refused to take up. On a rule for a mandamus to the company to take up the award:—

Held, by A. L. Smith and Romer L.JJ., Collins L.J. dissenting, that the effect of the special Act was to substitute the clauses relating to minerals of the Railways Clauses Consolidation Act, 1845, for those contained in the repealed Act, and that therefore the assessment was rightly made under the Railways Clauses Consolidation Act, 1845, and not under the repealed Act.

North Eastern Railway v. *Crosland*, (1863) 32 L. J. (Ch.) 353, distinguished.

Held, also, by A. L. Smith L.J., that the question whether the assessment of the amount of compensation to be paid to the owners of the minerals should have been made under the Railways Clauses Consolidation

C. A.
1899

REG.
v.
LONDON AND NORTH WESTERN RAILWAY.

Act, 1845, or under the repealed Act, could not be entertained upon shewing cause against the rule nisi to the company to take up the award.

Held, by Collins L.J., that it was an answer to an application for a mandamus that the umpire had assessed compensation under the wrong Act.

APPEAL from a judgment of a Divisional Court making absolute a rule nisi for a mandamus to the defendants to take up an award.

The London and Birmingham Railway was incorporated under an Act of 1833 (3 & 4 Will. 4, c. xxxvi.). By s. 54 of that Act mines and minerals were deemed to be excepted out of the purchase of lands, and might, subject to the restrictions hereinafter contained, be worked by the respective owners. By s. 65, when the proprietor, lessee, or tenant of any mines or minerals under the railway or within a distance of forty yards desired to work the same, notice was to be given to the company, who might purchase the mines or any part thereof; and in case of non-agreement as to value, the same was to be settled by the verdict of a jury, and in case the company in a certain time did not give notice of their desire to treat for the purchase of the mines, the proprietor, lessee, or tenant might work them without being liable to the company for any damage done thereby. By an Act of 1835 (5 & 6 Will. 4, c. lvi.), s. 22, it was enacted that the company were not to be entitled to any mines or minerals under any land purchased by them unless the mines had been expressly purchased and conveyed to the company; but the same were to be deemed to be excepted out of the purchase.

By an Act of 1846 (9 & 10 Vict. c. cciv.), the London and Birmingham Railway Company and other railway companies were consolidated into one company, the defendants, and the Acts relating to the dissolved companies were repealed. The repeal was not to annul or prejudice or affect anything done under the repealed Acts, or except as in this Act specially provided, or except so far as the same might be repugnant to the provisions of this Act, nothing therein contained was to defeat rights given under the repealed Acts for the benefit of persons whose estates, properties, or interests had been or might be affected by the making of the railways authorized by the repealed Acts.

By s. 2 it was enacted that "The Railways Clauses Consolidation Act, 1845, shall, so far as the same is applicable, and is not modified by this Act, or inconsistent with the provisions thereof, be held to apply to the company hereby incorporated . . . . and shall be read and construed as forming part of this Act, to all intents and purposes as if the said railways and works made under the powers and provisions of the said Acts hereby respectively repealed had been made under the powers and provisions of the said Railways Clauses Consolidation Act, 1845, instead of the said repealed Acts, and as if the said Railways Clauses Consolidation Act, 1845, had been expressly made applicable, and had been applied to or authorized to be applied to the railways existing at the time of the passing of the same Act, as well as to railways which should by any Act which should be passed after the passing of the said Railways Clauses Consolidation Act, 1845, be authorized to be constructed, and as if the said existing railways hereby vested in the company hereby incorporated, and hereby expressly or by reference authorized to be constructed, had been expressly or by reference authorized to be made and constructed under the powers and provisions of this Act; and as to all such and so many of any the provisions and powers in the said repealed Acts, or any or either of them, contained, for the benefit of the public at large," the same were to continue in full force notwithstanding the repeal of the Acts.

By s. 11 the Lands Clauses Consolidation Act, 1845, was incorporated.

By a deed-poll of May 30, 1839, the London and Birmingham Railway Company became entitled to the fee simple of land upon which part of the railway was subsequently made. In 1894 the plaintiffs were the owners of the minerals under the land so purchased, and they gave notice to the defendants that they were desirous of working the minerals under and within forty yards of the railway, unless the company were willing to treat for the purchase of and to make compensation for the same pursuant to the statute in that case made and provided. The company gave a counter notice of their desire to purchase certain portions of the minerals. An arbitration was held

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

under s. 35 of the Lands Clauses Consolidation Act, 1845, before an arbitrator appointed by the Board of Trade. The company appeared under protest, contending that the rights of the claimants were governed by the Act of 1833, and not by the Railways Clauses Consolidation Act, 1845. They asked the arbitrator to make an alternative award, which he declined to do, and he made his award assessing the amount of compensation to be paid to the claimants. The company declined to take up the award, and a rule nisi was obtained from a Divisional Court for a mandamus to the company to take up the award. The company shewed cause, and on the argument the rule was made absolute by Wills and Kennedy JJ.

The company appealed.

March 16. *Sir E. Clarke, Q.C.*, and *Page, Q.C.* (with them *A. Underhill*), for the defendants. The arbitrator in making his award has assessed compensation on a wrong basis. He has done so under the Railways Clauses Act, whereas the liability of the company is regulated by the Act of 1833. The effect of the proviso in the company's Act of 1846 is to leave the Act of 1833 and the agreement of 1839 unaffected, and compensation should be assessed upon that footing; otherwise effect is not given to the proviso. The reservation of rights under the old Act is exactly similar to that in *North Eastern Railway* v. *Crosland* (1), and it is submitted that the case before the Court is governed by that decision. It is true that the company agreed that an arbitrator should decide and not a jury, but that does not affect the question under which Act the amount of compensation should be arrived at. It is admitted that the claimants are entitled to some compensation, but the grant of land by the mine-owner must be read as if the Act of 1833 were incorporated in it: *Elliot* v. *North Eastern Railway*. (2) If the Railways Clauses Act applies, and the company refuse to buy, the owner of minerals can come on the surface and dig: *Ruabon Brick Co.* v. *Great Western Railway* (3); whereas the right to do so is negatived by s. 58 of the Act of

(1) 32 L. J. (Ch.) 353.
(2) (1863) 32 L. J. (Ch.) 402; 10 H. L. C. 333.
(3) [1893] 1 Ch. 427.

1833, which enacts that "from and after the passing of this Act no shaft, pit, or quarry shall be dug, sunk, or made in or on the said railway." The assessment being made under the wrong Act, the company are not bound to take it up: *Reg.* v. *Cambrian Railway* (1), and that which would be an answer on a return to the writ is good ground for resisting its issue.

[They cited also *Errington* v. *Metropolitan District Railway* (2); *Knowles* v. *Lancashire and Yorkshire Railway* (3); *Chamber Colliery Co.* v. *Rochdale Canal Co.* (4); *Great Western Railway* v. *Cefn Cribbwr Brick Co.* (5); *London and Blackwall Railway* v. *Cross.* (6)]

Dugdale, Q.C., and *Noble*, for the prosecutors. The question before the Court is whether the prosecutors are entitled to a rule absolute for a mandamus to take up the award; and most of the arguments for the defendants do not affect that question, though they might be raised on a return to the mandamus. The Act of 1846 is a scheme of amalgamation which deals with a number of railways and their Acts. The railways were dissolved and their Acts were repealed, though the proviso preserves existing contracts. The subject-matter of the contract of May, 1839, was the surface of the land and not the minerals; consequently clauses relating to minerals cannot be read into the contract. It does not in the least follow that, because the claimant is owner of the minerals, his predecessor in title was vendor of the land. The mineral clauses of the Act of 1833 are clearly repealed as to persons who at the time of the conveyance were not owners of the surface, and, if so, they must be repealed for all purposes, and the mineral clauses of the Railways Clauses Act substituted. Sect. 2 of the company's Act of 1846 is inconsistent with the idea that the mineral clauses of the prior Act still take effect. The company bought the land as a separate thing from the minerals, and subject as to them to any alterations the Legislature might make.

Sir E. Clarke, Q.C., in reply. It appears on affidavit, to

(1) (1869) L. R. 4 Q. B. 320.
(2) (1882) 19 Ch. D. 559.
(3) (1889) 14 App. Cas. 248.
(4) [1895] A. C. 564.
(5) [1894] 2 Ch. 157.
(6) (1886) 31 Ch. D. 354.

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

which there was no contradiction, that the vendor was the predecessor in title of the plaintiffs.

Cur. adv. vult.

April 24. A. L. SMITH L.J. read the following judgment:—In this case a Divisional Court, consisting of my brothers Wills and Kennedy, has made absolute a rule nisi for a mandamus obtained by the prosecutors, the Rugby Portland Cement Company, calling upon the defendants, the London and North Western Railway Company to take up an award made by an umpire appointed by the Board of Trade under the Lands Clauses Consolidation Act of 1845. The rule was obtained by the prosecutors under s. 35 of that Act, which imposes upon a railway company the duty to pay the fees and take up an award made under that Act, and to hand a copy of it to the other side, and should the company refuse to perform the duty, mandamus is the appropriate remedy, as will be seen from the judgments of Lord Campbell C.J. and Coleridge, Wightman and Erle JJ. in *Reg.* v. *South Devon Ry. Co.* (1) The position taken up by the defendant company is to me novel, and I must, as briefly as I can, state the facts so as to see what that position is.

Upon November 10, 1894, the prosecutors gave notice to the defendant company that they were desirous of working the minerals lying under and within forty yards of the railway unless the company were willing to treat for the purchase of and to make compensation for the same pursuant to the statute in that case made and provided. Upon May 28, 1895, the company gave the prosecutors notice that they desired to purchase certain portions of the minerals and to treat with the prosecutors for the same. Upon July 13, 1896, the prosecutors gave notice to the company that they claimed 6200*l.* for the purchase of the minerals specified in the notice of May 28, 1895, and 9030*l.* for compensation for leaving the same unworked under the railway, and the sum of 4007*l.* as compensation for the extent to which the minerals lying on the north side of the railway were injuriously affected; and by this notice the prose-

(1) (1850) 15 Q. B. 1043.

cutors informed the company that unless they would agree to pay the above-mentioned sums the prosecutors desired that the amount should be settled by arbitration in manner provided by the Lands Clauses Consolidation Act, 1845; and upon August 22, 1896, the company again gave the prosecutors a similar notice to that of May 28, 1895, namely, that they desired to purchase. Upon October 26, 1896, the prosecutors amended their claim of July 13, 1896, by claiming in lieu of the amounts therein mentioned the sums of 6200*l.*, 10,180*l.*, and 4007*l.* Upon March 13, 1897, the prosecutors, in order to get the compensation assessed, appointed, in accordance with the Lands Clauses Consolidation Act, 1845, Mr. John Wilmot to act as arbitrator on their behalf; and upon March 27, 1897, the company appointed Mr. Charles Hull to act as their arbitrator. This appointment of Mr. Hull, which is remarkable in form, recited that by an Act of 1833 (3 & 4 Will. 4, c. xxxvi.) the amount or value of the minerals in case of difference was to be settled by the verdict of a jury, and that the minerals claimed for were not subject to the provisions of the Lands Clauses Act, 1845, and it recited that the company denied that Mr. Wilmot or Mr. Hull had any jurisdiction to entertain the claims, but "Subject to and under protest and expressly reserving to themselves the right of applying to the Court to restrain the said arbitration, or of taking such other proceedings for the purpose of setting aside or disputing the award of the arbitrators or their umpire or otherwise as they may be advised, the railway company are willing to appoint you, the said Charles Hull, to be the arbitrator in their behalf in the matters aforesaid." Mr. Hull, being in this manner appointed arbitrator by the company, refused to concur in the appointment of an umpire; and the Board of Trade in due course was applied to on behalf of the prosecutors to appoint an umpire under the provisions of s. 28 of the Lands Clauses Consolidation Act, 1845, and the board thereupon appointed Mr. Forster Brown to act as umpire, and he sat and acted accordingly. The parties appeared before him with their witnesses and counsel, and the arbitration proceeded to its end. On the first day Sir Edward Clarke, for the defendant company, referred to the

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

A. L. Smith L.J.

fact that Mr. Forster Brown was appointed under protest. Mr. Hull, the arbitrator, was appointed in the manner I have above mentioned; but I find no document shewing that Mr. Forster Brown was appointed umpire under protest, but, on the contrary, I find his appointment by order of the Board of Trade dated May 14, 1898, which, after reciting the difference which has arisen between the prosecutors and the company as to the compensation claimed by the prosecutors, and after reciting that under the powers of the Lands Clauses Consolidation Act of 1845 the matters in dispute had been referred to two arbitrators, who for seven days had neglected to appoint an umpire, and reciting that the prosecutors had applied to the Board of Trade to appoint an umpire: "Now therefore the Board of Trade, in pursuance of the hereinbefore mentioned Act, do appoint you, the said Forster Brown, to act as umpire." Early in the arbitration Sir Edward Clarke made the following statement, which I will read: "Now my learned friend has come to a point where it is proper I should say something on the part of the railway company. Of course it is not merely curiosity that brings us here to-day. Having made that appointment of an arbitrator under protest, and the matter having now come under your jurisdiction, we, of course, appear before you in this case to guard the interests of the railway company. The first step by which I propose to guard their interest is to say that I appear here with my learned friends under protest altogether. We did appoint an arbitrator by the document which is before you, and which must be read with its whole contents. It recites the whole of what had taken place in the way of notices. It recites what had gone before with regard to an arbitration, and then it refers to the Acts of Parliament under which we say, in that appointment and by the notices that we gave to the claimants, that we are not liable to pay compensation to them upon the footing of the Railways Clauses Act, and that we are entitled when this matter comes before any tribunal to look at the terms of the Acts of 1833 and 1835, and to consider what the rights of the claimants were under those Acts, and at the time that the land was acquired under those Acts, without reference to the Act of 1845 at all. Now, of

course, there are two points involved in that. One is simply the question whether the decision of the matters is to be with a jury or with an umpire to be appointed in the usual way. I do not think we could, and certainly we should not, after the appointment of an arbitrator, take exception to the award simply on the ground that it was by an arbitrator instead of by a jury. I think my learned friend will be quite right in saying that we are quite estopped from that, and that what we have done must be taken to be an agreement to substitute the arbitrator for the jury; but that does not deal with the other and more important question as to the principles upon which the determining tribunal, be it a jury or be it an umpire, should assess the compensation in this case. What I propose to do is to take part in the case to see what evidence my learned friend's witnesses give, to put to them the question as to the rights and the extent of compensation to which the claimants would be entitled, assuming that the Acts of 1833 and 1835 govern the matter, and that we had nothing to do with the Act of 1845; and then I shall ask you to make an alternative award in this case, the result of which would be that we should then be able to go to the Courts and say, 'We have agreed to substitute an umpire for the jury. We make no complaint of that. We have asked the umpire to make an alternative award; he has done so, and we now ask the Court to say that the award which is made under the Acts of 1833 and 1835 (which obviously, I think, would be much smaller than an award under the 1845 Act) is the award by which we are to be bound.' Of course, my learned friend is entitled to use here or elsewhere anything that we have done which he can suggest estops us from setting up this case, but we need not dispute the matter here. That will have probably to be decided elsewhere, and I propose upon that footing, and that footing only, and with the most distinct protest against being supposed to take part in any arbitration under the Railways Clauses Act, to appear and take part in this case." There are other passages in the short-hand notes of the proceedings in which Sir Edward referred again to the Act of 1833, and, to state it shortly, he contended that the compensation should be assessed by the umpire under

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

A. L. Smith L.J.

the Act of 1833, and not under the public general Act of 1845; and when witnesses were called by the prosecutors, he not only cross-examined them in great detail as to the figures they had given as to the amount payable pursuant to an assessment under the Railways Clauses Consolidation Act, 1845, but he also sought to cross-examine them as to what they would have considered the compensation would have amounted to if assessed under the Act of 1833—the point sought to be made by the company being that the compensation was to be assessed upon the basis that the company were to become purchasers of the minerals, and not upon the basis of the company paying compensation to the mineral owner for depriving him of the use of his minerals. These questions were objected to and disallowed, and I think quite properly, by the umpire. He had been appointed to assess the compensation under the Act of 1845. He had no jurisdiction to decide any point of law arising under the repealed Act of 1833. In what way it would be more advantageous for the company to become purchasers, they not being able to work the minerals as a trading concern, I do not know, nor was any definite idea given at the bar as to this; but I do not stop to further discuss this matter, for it is not what I have in hand. When the prosecutors' case was closed, Sir Edward opened his case. He then called witnesses on behalf of the company in answer to the evidence given on behalf of the prosecutors, and, after five days' hearing at a very large expense, the arbitration came to an end, and the umpire has now made his award, and the company refuse to take it up and hand a copy of it to the prosecutors, as by the 35th section of the Act of 1845 it is enacted that they should do. It must here be noticed, as indeed it was noticed by Sir Edward Clarke in his remarks above mentioned, that if the compensation was to be assessed under the old repealed Act of 1833, a jury and not an umpire was the only tribunal with jurisdiction to assess the amount, and apart from consent of the parties, which there certainly was not in this case, even if this would have sufficed, I do not understand what jurisdiction the umpire had to assess compensation under the old Act of 1833. If the jury had been empanelled, it would only be when sued upon the verdict that

the defendant company could have taken exception to the verdict; and yet the company now say they will not take up that which upon their own case is the equivalent of a verdict, namely, the award.

In my judgment, the course adopted by the company is wholly misconceived. That the company cannot set up, in answer to a rule nisi to take up an award, what they are now attempting to set up, seems to me to be clear, and the course they have taken is not in accord with my recollection of the practice. In the case of *Reg.* v. *South Devon Railway* (1) above mentioned, the railway company sought to evade payment of the fees to the arbitrator by not taking up the award; but the Court would not permit it, and the case of *Reg.* v. *Sutton Harbour Commissioners* (2) is in my opinion in point. In that case, a landowner alleged that his lands had been injuriously affected by the works of a company, and gave notice to the company that he desired to have the amount of compensation settled by arbitration. The company refused to go to arbitration, denying that he had any claim at all, and refused to refer the amount or to appoint an arbitrator; whereupon the landowner appointed an arbitrator pursuant to the Lands Clauses Act, 1845, and proceeded ex parte, and the arbitrator made his award. The landowner then obtained a rule nisi calling upon the company to take up the award. Against this rule nisi the company attempted to shew cause, and they gave evidence that the prosecutor had not stated in his notice to the company what was the extent of his interest in the land for which he claimed compensation, which it was necessary under s. 23 of the Lands Clauses Act, 1845, that he should have done, so as to make a valid claim thereunder; that he had not shewn that his lands had been injuriously affected, and that he had required in his notice payment by the company within seven days, whereas by s. 68 of the Lands Clauses Act, 1845, the company had twenty-one days wherein to make the payment, and that for these reasons they had always protested against the proceedings. In other words, the company set up that the prosecutor had not brought himself within the provisions of

(1) 15 Q. B. 1043. (2) (1853) 2 W. R. 10.

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

A. L. Smith L.J.

the Lands Clauses Act, 1845, and that they had always protested that he had not done so, which is precisely similar to what the defendant company is contending for in the present instance. The Court of Queen's Bench, however, made the rule nisi absolute on the ground, it seems to me, that after an award has been made, upon shewing cause against a rule nisi for a mandamus to compel the company to take it up, the Court will not at that stage go into the question as to whether the award was well made or not. When the company has performed its duty and taken up the award and paid the fees, then whatever defences the company may have (as also in the case of a verdict of a compensation jury) will be open to them; but, in my judgment, this initial stage is not the time to make the attempt. It is said that the case of *Reg.* v. *Cambrian Railway* (1) shews the contrary; but, in my opinion, it does not. In that case, the owner of a ferry went to arbitration under the Lands Clauses Consolidation Act, 1845, with a railway company, alleging that his ferry had been injuriously affected by the works of that company. An umpire, who had been appointed in due course, made his award. The company refused to take it up, and the owner of the ferry thereupon obtained a rule nisi for a mandamus commanding the company to take up the award and produce a copy of it to him. It was sought by the company, in shewing cause against this rule, to establish that they had not injuriously affected the prosecutor's ferry within the meaning of the Lands Clauses Act, but the Court would not at that stage entertain this allegation, and made the rule absolute for a mandamus. The ferry-owner thereupon declared in mandamus, and by the return thereto the defendants pleaded that the prosecutor's ferry had not been injuriously affected by their works within the meaning of the Lands Clauses Consolidation Act, and that the prosecutor was not entitled to recover compensation from them. The truth of this return was admitted by the prosecutor, for he simply demurred to the return and did not traverse it. Upon argument of this demurrer, the point being whether the return was a good one or not, it was held by the Court to be good, because

(1) L. R. 4 Q. B. 320.

the truth of the return being admitted by the prosecutor, as Cockburn C.J. said, it was admitted by the prosecutor that he was not entitled to compensation, and as Lush J. said, by s. 68 of the Lands Clauses Act, 1845, the very foundation of jurisdiction to proceed by arbitration is the fact that the claimant is entitled to compensation, and upon the record he admitted he was not. In these circumstances the Court held the return a good one, and I do not know how it could have held otherwise. The prosecutors admitted that they were entitled to nothing. Then, what right had they under s. 35 to have the award taken up by the company and a copy of it handed to them to see what it was?

In the present case, when before the umpire, the defendant company desired that alternative awards should be made—one upon the footing that the Lands and Railways Clauses Consolidation Acts of 1845 were the statutes governing the assessment of compensation; and the other upon an assessment under the old Act of 1833, long since repealed. But this was not assented to by the prosecutors; and I can well understand why they should not have willingly assented to the suggestion, for it would have about doubled the length of the arbitration. The company, however, were not without remedy, for I apprehend that they might have applied to the Court under s. 19 of the Arbitration Act of 1889 (52 & 53 Vict. c. 49) to order the umpire to state his award in the form of a special case, and if they could have shewn a point of law they would have obtained an order; but they did nothing of the kind, for they attended the arbitration to its end, cross-examined the prosecutor's witnesses at great length, then called evidence on their own behalf to cut down the prosecutor's figures, and made speeches, though it now appears they all the time intended that they would not take up the award when it was made, and as far as in them lay would make the whole proceedings abortive and a waste of money, and that neither the prosecutor's arbitrator nor the umpire should be paid their fees by the company which by law they were entitled to be paid. In my judgment, whether the umpire has gone wrong in assessing the compensation for these minerals under the Railways

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

A. L. Smith L.J.

Clauses Consolidation Act, 1845, and not under the old repealed Act of 1833, this cannot and should not be entertained upon shewing cause against the rule nisi. In my judgment, the defendant company must perform their statutory obligations, pay the fees, take up the award, and hand a copy of it to the prosecutors, and then they may take what points are open to them to impeach the award. Upon this ground I think that the rule nisi should be made absolute.

But take it that this is not so, what is the defendants' point which they make? They allege that the compensation to be paid to the prosecutors for their minerals is to be assessed under the old repealed Act of 1833, and not under the Lands and Railways Clauses Acts of 1845. The question, be it remembered, is not whether the prosecutors could have claimed against the company that their compensation for being deprived of working their minerals was to be assessed under the old repealed Act of 1833—I give no opinion thereon whatever, for it is not before me—but is whether the company can in the year 1894 set up as against the prosecutors that they, the company, are entitled to have recourse to the old Act of 1833, the repeal of which Act they brought about by their private Act of the year 1846, and how this was done will now appear.

By an Act of 1846 (9 & 10 Vict. c. cciv.), which was a private Act obtained by the defendant company to consolidate the London and Birmingham, Grand Junction and Manchester and Birmingham Railway Companies, eight railway companies were dissolved, and seventeen different Acts of Parliament were repealed, the Act of 1833 and the company thereby incorporated being amongst the number. Out of the ashes thus created by the Act of 1846 sprang the London and North Western Railway Company. By s. 2 of this Act it is enacted that, so far as the same is applicable and is not modified by this Act or inconsistent with the provisions thereof, the Railways Clauses Consolidation Act shall be held to apply to the company thereby incorporated (that is, to the London and North Western Railway Company), and shall be read and construed as forming part of the Act of 1846, "to all intents and purposes as if the said railways and works made under the powers and provisions

of the said Acts hereby respectively repealed had been made under the powers and provisions of the said Railways Clauses Consolidation Act, 1845, instead of the said repealed Acts, and as if the said Railways Clauses Consolidation Act, 1845, had been expressly made applicable, and had been applied to or authorized to be applied to the railways existing at the time of the passing of the same Act, and as if the said existing railways hereby vested in the company hereby incorporated had been expressly or by reference authorized to be made and constructed under the powers and provisions of this Act" (i.e., the Act of 1846), "and as to all such and so many of any of the provisions and powers in the said repealed Acts contained for the benefit, advantage, security, protection, or convenience of the public at large, either in person or property, as shall not by or by virtue of this Act, or the incorporation of the said Companies Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, be either expressly or by reference repeated or re-enacted or otherwise provided for, the same still remain, continue and be in full force and virtue notwithstanding the repeal of the said Acts, and shall be applicable to and may be enforced upon and against the company hereby incorporated." Though verbose, in my judgment nothing can well be clearer than this private Act of 1846. By it all prior existing Acts relating to the absorbed companies are repealed—all the absorbed companies are dissolved. The London and North Western Railway Company is brought into existence to rule in the place of the dissolved companies, and not only is the then recently passed public and general Act, the Railways Clauses Consolidation Act of 1845, incorporated into the Act of 1846, but it is expressly enacted that the Railways Clauses Consolidation Act shall be read into and form part of the Act of 1846, to all intents and purposes as if the railways and works made under the powers and provisions of the repealed Acts had been made under the powers and provisions of the Railways Clauses Consolidation Act of 1845—in other words, as if the railway and works constructed under the Act of 1833 had been constructed under the powers and provisions of the Railways Clauses Consolidation Act of 1845, though in fact

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

A. L. Smith L.J.

the railway and works under the Act of 1833 had been completed before the general Act of 1845. For what purpose was it that the Railways Clauses Consolidation Act of 1845 was not only incorporated with, but was to be read into the Act of 1846, to all intents and purposes as if the railway and works made under the repealed Act of 1833 had been made under the Railways Clauses Consolidation Act of 1845? It will not be forgotten that, as before stated, the railway and works constructed under the authority of the Act of 1833 had in the year 1846 been completed, and as regards the execution of such works no Act of Parliament was required. There was, however, in 1846 at least one matter outstanding and incomplete, that is the matter relating to the minerals, left open as they were until the mineral owner in after times desired to work them within the forty yards of the railway. Is not the reason clear why the Railways Clauses Consolidation Act of 1845, at any rate as regards minerals, was incorporated with the special Act of 1846 in the peculiar way it was? In my opinion, the object and intent of the Legislature was well carried out by what it then enacted, namely, that the London and North Western Railway Company should for ever thereafter be bound (when the time came to deal with the minerals) by the general Act of 1845, and that as regards minerals, so far as the London and North Western Railway were concerned, the old Act of 1833 should be blotted out, and that the public general Act of 1845 should be the governing statute in the case.

But it is said by the company, who are now being asked by the prosecutors to pay compensation for minerals according to the terms and provisions of the company's own Act of 1846, that in the 1st section of this Act there is a proviso which alters all this, and which permits the company to say to a mineral owner who, in the year 1894, is claiming compensation for his minerals which he desires to work, that the Railways Clauses Consolidation Act of 1845 does not apply, and that the Act alone applicable thereto is the repealed Act of 1833. The proviso is as follows: "Provided nevertheless that the repealing of the said Acts shall not . . . . annul or in any way prejudice or affect any purchase, sale, conveyance, grant, con-

tract, security, act, matter or thing whatsoever heretofore made, done, committed or executed under or by virtue or in pursuance of the said repealed Acts or any of them . . . . provided also that, except as is herein otherwise specially provided, or except so far as the same may be repugnant to the provisions of this Act, nothing herein contained shall extend in any way to defeat, affect or prejudice any rights, privileges . . . . or exemptions which under or by virtue of the said recited Acts are given, granted, continued, or reserved to or for the benefit of any persons . . . . whose estates, properties or interests are, have been, or may be in any wise affected in or by the making or maintaining . . . . of the railways . . . . authorized to be made and maintained or to which such persons . . . . but for the repeal of the said Acts would have been, otherwise entitled." This is how the company shape their case. They refer to a deed-poll of May 30, 1839, whereby in consideration of the sum of 1680*l.* the predecessors in title of the prosecutors conveyed to the Birmingham Railway Company the fee simple of the land upon which that railway was made, and which is now vested in the defendant company, including therein compensation for damages by severance, pursuant to the Act of 1833, "together with all . . . . such estate, right, title and interest . . . . in and to the same . . . . as we or either of us are or shall become seised or possessed of," to state it shortly, "to hold the premises according to the true intent or meaning of the said Acts respectively relating to the said company," that is the Act of 1833—I will omit the Act of 1835, for that is not material to the present case. The defendant company allege that, by reason of this proviso in s. 1 of the Act of 1846, the conveyance of May 30, 1839, remains unaffected and where it was when it was executed, and that they are, therefore, entitled to say that, as regards themselves, compensation must in the year 1894 be assessed as if the claim thereto had been made prior to the repeal of the Act of 1833, and, therefore, prior to the passing of their Act of 1846.

In my judgment this is not so, for the meaning of that proviso in the Act is this—that the dissolution of the eight

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

A. L. Smith L.J.

companies and the repealing of the seventeen Acts of Parliament, which the defendants have brought about by their Act of 1846, should not prejudice or affect the rights by contract or otherwise which persons might have at the time of the passing of that Act against any of the dissolved companies. The proviso is in favour of persons against the companies then dissolved and again represented by the incorporation of the London and North Western Railway Company, and is not a proviso in favour of the dissolved companies or of the defendant company. The protection as regards minerals, which the London and North Western Railway Company acquired by the Act of 1846, was the protection afforded by the then recently passed public general Act of 1845, and this protection they have fully obtained. To hold that the London and North Western Railway Company could still resort to the abolished rights as regards minerals under the repealed Act of 1833 would, in my judgment, be out of all reason, and is not the true effect of the legislation relating thereto.

We were pressed in argument by different authorities, in which it had been held that the provisions of old Acts had in certain cases been left standing, although the old Acts had been repealed, and the case mostly relied upon by the company was that of the *North Eastern Railway* v. *Crosland* (1), decided by Knight Bruce and Turner L.JJ. The actual decision in that case is to me clear, for it was that where a landowner had conveyed to a railway company "the right and privilege of making and for ever thereafter maintaining" a tunnel through his land, he could not afterwards call upon the railway company to compensate him for the minerals when he desired to work them within forty yards of the line, because he had sold the right to support to the tunnel to the railway company, and consequently could not make the company again pay for the minerals. It will be seen at p. 357 of the report that the bill was framed upon this hypothesis, and upon this alone, by the company against the landowner, by which bill the company sought to restrain the landowner from winning minerals within forty yards of the line, which he threatened to do unless the

(1) 32 L. J. (Ch.) 353.

company paid him for them, and the company were successful. Knight Bruce L.J. gave judgment against the landowner solely upon the ground upon which the bill was framed. Turner L.J. dealt with the statutes which existed in that case; but I must point out that, although some parts of the Act therein referred to were similar to those in the present case, when taken as a whole the legislation in that case does not appear to me to cover this case. In that case there was no Act of Parliament such as the Act of 1846 in the present case, by which not only old Acts were repealed and old companies dissolved, but into which a public general Act was not only incorporated, but by express enactment it was enacted that the public general Act should be read into the repealed Acts, as if the railway and works constructed under the repealed Acts had been constructed under the powers and provisions of the subsequent general Act of 1845.

In my judgment no case has been cited which compels me to put a construction upon the very special legislation of the present case other than what I apprehend is the true construction of the legislation; and in my opinion, even if at this stage the point now raised by the company can be entertained, it does not avail them. No point is now made as to whether the landowners sold the minerals for the 1680*l.* in the year 1839 to the then existing railway company, but it is said by the London and North Western Railway Company that the point is kept in reserve to be taken when the award is taken up and proceedings to enforce the same are had.

In my judgment the award must be taken up. Whichever ground be taken in this case, in my opinion the defendant company are in the wrong, and the judgment of my brothers Wills and Kennedy must be affirmed, and the appeal dismissed.

COLLINS L.J. read the following judgment:—I am of opinion that the rights of the Cement Company and the railway company in this case are governed by the Act of 1833, and not by the Railways Clauses Consolidation Act, 1845. I think the decision in *North Eastern Railway* v. *Crosland* (1) is directly

(1) (1862) 2 J. & H. 565; affirmed on appeal, 32 L. J. (Ch.) 353; 4 D. F. & J. 550.

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

Collins L.J.

in point. That is a case of the highest authority, being a decision of Page Wood V.-C., affirmed by Knight Bruce and Turner L.JJ. There, as here, there was a special Act, under which the railway had been made, which regulated the rights of the parties to minerals under lands sold to the company. Subsequently, and after the railway had been built, an Act was passed to enable it to be sold to another railway company, and, as in the case before us, the subsequent Act repealed the original Act with certain qualifications, and made the Act under which the purchasing railway was constructed applicable, subject to such qualifications, to the purchased railway. The provisions of the later Act regulating the right to minerals under and adjoining the line differed materially from those of the repealed Acts under which the purchased railway had been constructed, conferring upon or preserving to the mine-owner larger rights than those which he would have had under the earlier Act. The decision was that the rights of the parties as ascertained under the original Act remained notwithstanding its repeal, and the mine-owner was restrained from acting upon the larger rights which he would have had under the later Act had it been held to govern the case.

The difference in the rights given or preserved under the old Act and the new is not the same in the case before us as it was in *North Eastern Railway* v. *Crosland* (1); but that there is a substantial difference cannot be doubted, and the Court below have so held. The precise extent or nature of the difference does not affect the question. But in order that that case should be an authority, it must appear that the rights of the parties here were originally governed by the earlier Act, and that the saving clause on the repeal was substantially similar. The crucial clauses, therefore, in the two sets of Acts are those which save existing rights on the repeal of the old Acts, and those which apply the new Acts to the original undertaking. When these sections are closely examined they will be found in the material parts to be not only similar, but identical in the most important clauses. I will make this good. In the *North Eastern Railway* v. *Crosland* (1), s. 4 of the repealing Act

(1) 32 L. J. (Ch.) 353.

contained the following saving clause: "Provided always that the repeal of the said recited Acts shall not annul, or in any wise prejudice or affect, any purchase, sale, conveyance, grant, security, act, matter or thing whatsoever theretofore made, done, executed, commenced or instituted under or by virtue or in pursuance of the said recited Acts so repealed, or either of them; but that all such purchases, sales, conveyances, grants, securities, acts, matters and things shall be and remain as good, valid, and effectual to all intents and purposes whatsoever as if the same recited Acts had not been repealed." The saving clause in 9 & 10 Vict. c. cciv. s. 1, that is, the later Act in this case, is in precisely the same terms. In *North Eastern Railway* v. *Crosland* (1) the clause which applied to the purchased railway the Acts regulating the buying company is in these terms: "Be it enacted that . . . . all and singular the powers and provisions, clauses, matters and things in the recited Acts or in any of them contained, shall, so far as they are not repealed, altered, varied or otherwise provided for by this Act extend to" the purchased railway "when the same shall have so as aforesaid become vested in and made part of the undertaking of" the buying company, "and as if the enactments, powers, provisions, clauses, matters, and things in the same Acts or any or either of them contained, had been in and by the last mentioned Acts expressly enacted in reference to" the purchased railway, "and the works, conveniences, lands, tenements, and hereditaments of or belonging thereto or connected or used therewith." The words applying the Railways Clauses Consolidation Act in the present case are contained in s. 2 of 9 & 10 Vict. c. cciv., and are as follows: "The Railways Clauses Consolidation Act, 1845, shall, so far as the same is applicable, and is not modified by this Act, or inconsistent with the provisions thereof, be held to apply to the company hereby incorporated, and the railways and works by this Act vested in and authorized to be made by the company hereby incorporated, and shall be read and construed as forming part of this Act, to all intents and purposes as if the said railways and works made under the powers and provisions of the said Acts hereby

(1) 32 L. J. (Ch.) 353.

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

Collins L.J.

respectively repealed had been made under the powers and provisions of the said Railways Clauses Consolidation Act, 1845, instead of the said repealed Acts, and as if the said Railways Clauses Consolidation Act, 1845, had been expressly made applicable, and had been applicable to or authorized to be applied to the railways existing at the time of the passing of the same Act as well as to railways which should by any Act which should be passed after the passing of the said Railways Clauses Consolidation Act, 1845, be authorized to be constructed, and as if the said existing railways hereby vested in the company hereby incorporated, and hereby expressly or by reference authorized to be constructed, had been expressly or by reference authorized to be made and constructed under the powers and provisions of this Act." Though not as in the last instance identical these two sections correspond in all substantial particulars. They both contain in similar language the qualifying clause which was held in *North Eastern Railway* v. *Crosland* (1) to let in the operation of the saving clause, and, subject to such qualification, they both apply the later Acts in the fullest possible way to the existing railway. The same effect, therefore, must be given to the saving clause in both cases, and the *North Eastern Railway* v. *Crosland* (1) is in point and governs this case. It was said that case was distinguishable on the ground that the right there held to subsist for the railway company, notwithstanding the later legislation, was a common law and not a statutory right. But this view cannot be maintained for two reasons: first, that it is not true in fact; secondly, that even if true it would not suffice to distinguish the case. The conveyance in that case, as in this, was expressly made "according to the true intent and meaning of the Act." The effect in both cases, therefore, would be that the mineral rights would be governed by common law except so far as they were modified by statute, and the conveyance would be taken to be made and the price adjusted by reference to the rights of the parties so ascertained. "I regard," says Wood V.-C., "the 30th clause of the Leeds and Selby Act," i.e., that under which the conveyance was made, "as imported into

(1) 32 L. J. (Ch.) 353.

the contract for the land; and I hold that the contract with that clause so imported into it was not meant to be affected by the subsequent Act." (1) The bargain would be made in reference to the rights as a whole, and, whether the statute was substituted wholly or partly only for the common law, in ascertaining them they were protected by the contract, and unaffected by the subsequent legislation. The rights actually dealt with were twofold, namely, that to support from mines under the railway, as to which the statute was express, and that to lateral support from those adjoining, as to which the statute was silent, and both were held to be safeguarded.

It can make no difference that the rights in the present case were dealt with in more than one section. "The conveyance to the company," says Lord Chelmsford, in *Elliot* v. *North Eastern Railway* (2), "was made in the form prescribed by the Act, and must be read as if the sections applicable to the subject-matter of the grant and its incidents were inserted in it." If these rights are preserved they are, therefore, preserved as part of a contract, and it can make no difference whether the subsequent legislation is more favourable to one party or the other. Nor can it, I think, affect the principle whether the earlier legislation, be it contained in a special or a general Act, purports, as in this case, to deal generally with the mineral rights, or, as in *North Eastern Railway* v. *Crosland* (3), only with those of persons who have made contracts relating to them. Given a contract made with reference to this statute, and the statutory provisions will govern the contract and affect the price, and any subsequent legislation which alters the statutory rights will, therefore, involve an alteration of the contract. The Act which in *North Eastern Railway* v. *Crosland* (3) was held not to override the pre-existing rights dealt generally with mineral owners who had not sold, as well as those who had sold, to the railway company, just as does the Railways Clauses Act. It could not, I think, have had any higher effect if the earlier Act had purported to deal generally with the rights of all mineral owners, and not only of those

(1) 2 J. & H. at p. 577. (2) 32 L. J. (Ch.) 402; 10 H. L. C. 333.
(3) 32 L. J. (Ch.) 353.

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

Collins L.J.

who had sold the surface to the railway company. As soon as a contract was made with reference to the general provisions of the Act they became parts of the contract, just to the same extent as they would have done if they had been by enactment applicable only where the mine-owner sold the surface to the railway company. The grant which would primâ facie carry the minerals is cut down by the effect of the sections with reference to which the contract is expressly made, and the larger the restrictions placed on the mine-owners' interference with the surface, the larger will be the price payable for the surface by the railway company. It gets more and it pays more. Those restrictions could not be afterwards altered without affecting the existing bargain. I think, therefore, that no sound distinction can be made on this ground between *North Eastern Railway* v. *Crosland* (1) and the present case. Nor do I think that the provisions for safeguarding public rights in the repealing Act can limit or cut down the independent words which have already been held adequate to protect existing contracts; and if these are saved at all, they are saved for both parties thereto. On the hypothesis, therefore, on which this case was decided in the Court below, and which was not seriously contested in this Court, namely, that there is a real difference in the rights of the parties, as ascertained under the original contract as compared with what they would be under the Railways Clauses Act, I am of opinion that they are preserved.

The *North Eastern Railway* v. *Crosland* (1) does not stand alone. It is one of a series of cases of which *Great Western Railway* v. *Cefn Cribbwr Brick Co.* (2) is another, which affirms a principle that legislation will not be construed as interfering with existing rights unless a clear intention to do so can be gathered from the language used. The actual language used here has, as I have shewn, been held adequate to preserve them.

I cannot help thinking that my brothers Wills and Kennedy were somewhat misled by the argument for the respondents in the Court below into ignoring the exact correspondence between

(1) 32 L. J. (Ch.) 353. (2) [1894] 2 Ch. 157.

the material sections in the *Crosland Case* (1) and that before them, and as there was no reply it was not pointed out to them. I am sensible of the difficulty of supposing that the Legislature in making the Railways Clauses Act applicable to a railway already constructed could have intended the mineral clauses to be ousted wherever a conveyance had been made by the mine-owner under the earlier Acts. But the difficulty is diminished by the fact that the Railways Clauses Act is applied as a whole and not with special reference to the mineral clauses which will be fully applicable to "railways by this Act authorized to be made," and also to those already constructed so far as the rights of mineral owners have not become the subject of contract.

It seems to me also to be in accordance with sound reason as well as authority to hold that existing contractual rights are not modified by ex post facto legislation, and I am not disposed to let considerations of convenience interfere with the application of this rule. It is perhaps worth noticing that as late as 1890 all parties seem to have treated their rights as governed by the earlier Act.

As to the point that this is not the proper stage to interfere with the arbitration, which does not seem to have been taken in the Court below, I think that if the view above stated is sound there can be no doubt that the umpire had no jurisdiction to assess compensation under the new Act; and if this be admitted, it is a good answer to an application for a mandamus to take up an award made without jurisdiction. I think the London and North Western did nothing by their conduct to confer jurisdiction if it did not exist, or to debar themselves from now asserting that it does not exist.

I am compelled to hold, therefore, though I need scarcely say with great diffidence, that this appeal should be allowed.

ROMER L.J. read the following judgment:—The main question involved in this appeal is the construction and effect of the Act of 1846 with reference to what I may call the mineral sections of the Railways Clauses Consolidation Act of 1845.

(1) 32 L. J. (Ch.) 353.

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

Romer L.J.

Now, the Act of 1846 was one passed for the purpose of amalgamating several lines of railway previously constructed under divers Acts, and of making those lines one common undertaking governed by one Act. In my view, looking at the various provisions of the Act of 1846, it was intended thereby, so far as possible, to make the amalgamated line, and common undertaking, homogeneous; so that in the future, so far as concerns what I may call general working provisions, the distinctions between the old lines should be abolished, and the lines should be treated as if they had originally been constructed under one Act, containing one set of general working provisions—that is to say, the provisions contained in the important Clauses Consolidation Acts of 1845. It appears to me that it was with the object of making the amalgamation complete, and of preventing the distinctions which would otherwise have continued between lines constructed under general provisions of former Acts differing somewhat from the general provisions in the Acts of 1845, that the Act of 1846, in s. 2, expressly provided for the general provisions of the Acts of 1845 having a retrospective operation, and for the lines being treated as if they had been made and constructed under the Act of 1846, which incorporated the Clauses Consolidation Acts of 1845. Now, amongst the most important general provisions of the Railways Clauses Consolidation Act of 1845 are what I have called the mineral sections. It appears to me clear that the Act of 1846 intended those mineral sections to apply to the consolidated and amalgamated line, for there are no other mineral sections at all in the Act. Taking the case of the old line now before us, namely, that constructed under the Acts of 1833 and 1835, there was no real hardship on the railway company in providing that the old line should be treated as if the mineral sections of the 1845 Act applied to it, and not the mineral sections of the Act of 1833. This is apparent when the sections are compared and considered, including a consideration of ss. 54 to 58 inclusive of the Act of 1833, on which the railway company chiefly relied in support of their case. If some special right of importance, say, a right of support, had by the mineral sections of the 1833 Act been given to the rail-

way company as purchaser of lands against the vendor in his capacity of vendor, and such special right would have been wholly taken away by putting the mineral sections of the Railways Clauses Act of 1845 in place of the mineral sections of the 1833 Act, I should have hesitated much before I came to the conclusion that it was intended by the Act of 1846 to inflict such a great hardship upon the railway company as would have followed from my giving to the Act of 1846 the interpretation I do. But that is not the case. Nor can I find anything which would enable me to say (following the words of s. 2 of the Act of 1846) that the mineral sections of the Railways Clauses Consolidation Act of 1845 are not wholly "applicable," or are in any way "modified by the Act of 1846," or "inconsistent with the provisions thereof." It is very significant that the only express saving clause in s. 2 of the Act of 1846 is in favour of the public at large.

Bearing in mind what is the main object of the Act of 1846, I proceed to consider what would be the effect if the railway company's contention in this case were held sound. It would withdraw from the amalgamated homogeneous line, so far as concerns the mineral sections, all those parts of the old line made under the Acts of 1833 and 1835 which were bought by the railway company, with the usual exclusion of the minerals, from vendors holding the adjacent minerals—that is to say, the greater part of the line. So that the thorough amalgamation contemplated by the Act of 1846 would be most materially impaired, and much confusion and difficulty would ensue. Instead of being governed by the now well-known provisions as to minerals, which an adjacent owner of minerals is aware of and is accustomed to act upon, the line of the railway company would be split up into portions governed by different provisions, and a landowner wanting to proceed to work his minerals would be bound to investigate under what old repealed Acts the adjacent portion of the railway line was made, and also to find out (if he could) whether or not any predecessor in title of his had conveyed that portion to the railway company's predecessors. It appears to me that the Legislature in passing the Act of 1846 did not contemplate or intend such a state of

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

ROMER L.J.

things, and that on the true construction of that Act the mineral sections of the Railways Clauses Consolidation Act of 1845 are to apply even to those portions of the line which were bought from the predecessors in title of owners of minerals seeking to enforce those sections. As I have already pointed out, s. 2 of the Act of 1846 is clearly against the railway company's contention, unless some sufficient reason can be shewn for excluding from the general effect of the section minerals under lands bought from the owner of the minerals or his predecessor in title.

Now, the reason urged by the railway company, stated shortly, is the following. It is said that, in the case of lands bought under the Act of 1833, all the mineral sections of that Act must be treated as made part of the contract with and conveyance from the owner of the lands, and that the rights of the company to enforce the provisions of those mineral sections are kept alive by s. 1 of the Act of 1846. It appears to me that this contention ought not to be sustained, having regard to what I have already said, and to the following observations. The only part of s. 1 that the railway company can rely on is the declaration that the repeal of the former Acts thereby made shall not annul, prejudice, or affect any purchase, sale, conveyance, grant, contract, security, act, matter, or thing made, done, committed or executed under or by virtue, or in pursuance of the repealed Acts, and that every such purchase, &c., shall be as good, valid, and effectual as if the said Acts had not been repealed. But this declaration is limited to the effect that might otherwise have followed from the said Acts being repealed. It does not say that no purchase, &c., is to be affected by the subsequent provisions of the 1846 Act, and in my opinion there is nothing in that declaration which is inconsistent with full effect being given to the provisions of s. 2 of that Act. I do not say that the above view is necessarily fatal to the appellants, or that similar language in another Act might not receive a more extended meaning. But in this Act I think ss. 1 and 2 have to be construed together, and I can see no difficulty in reconciling them in the way indicated in this judgment. It should be observed that the declaration in s. 1

extends to any "act, matter, or thing," and therefore to hold that the declaration, without any limitation at all, is unaffected by anything in the Act contained, would have practically rendered s. 2 useless so far as it made the consolidating Acts of 1845 retrospective. Indeed, even assuming that the declaration in s. 1 had been in terms not limited as it is to the repealing of the old Acts, I should still have felt bound in dealing with s. 2 to put some limit on the generality of the declaration in s. 1, and to reconcile it with s. 2. I should find no real difficulty in giving proper effect, both to the declaration in s. 1 and to s. 2. With regard to the railway company's rights under the purchase and conveyance from the prosecutor's predecessors in title, full effect could be given to those rights without unduly disregarding the provisions of s. 2. Sect. 54 of the Act of 1833, which was repeated in s. 22 of the Act of 1835, dealt with the effect of purchases by the then railway company so far as regards the minerals. The effect was to give to the company the right only to so much of the minerals under any lands purchased as might be necessary to be dug or carried away, or used for the purposes of the railway. The remaining minerals were not sold, and might be worked by the owner subject to the restrictions contained in ss. 55 to 58 inclusive of the Act of 1833. Those sections are general in their application, and apply to all persons coming within their ambit, whether vendors, or claiming through vendors, or not. Such rights, therefore, as the company obtained under these general sections were obtained, not in the capacity of purchaser, or by reason of any special contract, or of any conveyance, but because the sections were general, and applied to vendors as well as to others. A vendor to the company was bound by the sections, not by reason of his sale or conveyance to, or of any contract with the company, but because the sections were general. Consider what would have been the result if after contract and before conveyance a dispute had arisen between the vendor and the railway company as to the form of the conveyance. Suppose the railway company had insisted that the conveyance should contain covenants or provisions expressly binding the vendor in that capacity, and not merely as a

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

Romer L.J.

member of the public, in terms corresponding with the provisions of the sections in question, and the vendor had objected on the ground that he had not made any special contract on the subject as vendor, but offered that a covenant or provision should be inserted binding him not to work the minerals at any time thereafter contrary to the statutory provisions in that behalf for the time being in force regulating such working. Could the railway company have successfully maintained its contention? I think it could not. When public sections of an Act of Parliament affecting a railway company are altered by public sections in a subsequent Act, there is nothing to prevent a person relying upon and claiming the benefit of the provisions of the subsequent Act merely because he happens to have formerly occupied the position of vendor to the railway company. To prevent that vendor from claiming such benefit, the railway company must shew some special contract, express or implied, in his sale or conveyance which would be broken by his so doing. In the case before us I can see nothing to prevent a vendor to the old company under the Act of 1833, or any person claiming through such a vendor, from insisting as against the present company on the right to enforce the general statutory provisions as to minerals of the Railways Clauses Consolidation Act of 1845 which were made binding on the company by the Act of 1846.

The cases cited in the argument on behalf of the appellant company do not, in my opinion, apply to the special circumstances of this case. I need only refer in detail to one of those authorities, namely, the *North Eastern Railway* v. *Crosland*. (1) When that case is looked into, though undoubtedly bearing a general resemblance to the case before us, it will be found that the circumstances differ, and in my opinion (though, having regard to Collins L.J.'s judgment, I express it with diffidence) differ materially, and in such a way as to render it misleading to treat that case as one governing the present. In order to shew this I will state as shortly as I can the facts of that case. A railway company, which I will call the Leeds Company, was governed by an Act of 1830, which in effect provided that in

(1) 32 L. J. (Ch.) 353.

purchases of land for the railway, though the minerals were not included, the company as purchaser should have rights of support which would prevent the vendors, or those claiming through them, from so working minerals as to let down or damage the railway or works. The defendant's predecessor in title executed a conveyance to the company which shewed clearly that the company were to have such rights of support; so that the company by contract and conveyance had, as purchaser, obtained a right against the vendor and those claiming through him, to prevent him or them working the minerals so as to damage the railway or works. Another railway company, which I will call the York Company, was governed by Acts which did not provide for its purchases of land giving it a right of support. Then in 1844 an Act was passed, by which (stating it shortly) the Leeds Company was empowered to sell its undertaking to the York Company, and it was provided that on payment of the purchase-money the Leeds Company's Acts were to be repealed, but the repeal was not to prejudice or affect any purchases, contracts, conveyances, matters, or things made or done under the repealed Acts, which were to remain as valid and effectual as if there had been no repeal, and all such contracts and conveyances were to be as enforceable by the York Company as if the York Company had been party thereto instead of the Leeds Company. It was further provided that on payment of the purchase-money the general statutory provisions of the York Company, so far as not repealed, altered, varied, or otherwise provided by the Act of 1844, should extend to the undertaking of the Leeds Company as if those provisions had applied to the undertaking and had been expressly enacted in reference to it. The purchase contemplated by the Act was completed, and the purchase-money paid, and all the rights of the Leeds Company as purchaser from the defendant's predecessor in title became vested in the York Company, and ultimately in the North Eastern Railway Company. The defendant then threatened to work the minerals under the premises conveyed to the Leeds Company on the footing that they were not bound to regard the rights of support granted by the conveyance. He contended that the rights of support had been

C. A. 1899

REG. v. LONDON AND NORTH WESTERN RAILWAY.

Romer L.J.

taken away by the Act of 1844. The Court of Appeal, affirming Wood V.-C., held that an injunction was rightly granted to restrain such threatened working, and that on the true construction of the Act of 1844 it was not intended to deprive the York Company, as purchaser from the Leeds Company, of the rights of support acquired by the Leeds Company under the conveyances from the defendant's predecessors in title. No doubt in that case there was a difficulty in the way of the North Eastern Railway Company, owing to the wording of the Act of 1844; but the Court saw its way to get over the difficulty, and under the circumstances I should have been surprised if it had not done so, for it could not reasonably have been supposed that the Legislature intended by that Act, for no apparent or sufficient reason, to wholly deprive the railway company of a valuable right acquired by purchase. In the case now on appeal I come to the conclusion that the railway company did not acquire as purchaser any corresponding valuable right, and that, so far as the railway company seeks to claim the benefit of the mineral sections of the Act of 1833, it was intended by the Act of 1846 that those sections should, as regards the company, be wholly superseded by the mineral sections of the Railways Clauses Consolidation Act, 1845. Not only is that, in my opinion, a reasonable construction to be put on the Act of 1846, but I think a contrary construction would lead to great difficulty and confusion, and could not have been intended by the Legislature.

For these reasons I think the appeal ought to be dismissed, and I need not consider the other points raised by the respondents in answer to the appeal.

Appeal dismissed.

Solicitors for prosecution: *Whitfield & Harrison.*
Solicitor for defendants: *C. H. Mason.*

A. M.

EATON *v.* TAPLEY.

1899
April 27.

County Court—Practice—Special Defence—Notice—Statutes of Limitation—County Court Rules, 1895, *Order x., rr.* 14*a*, 18*a*.

In an action in the county court, a notice of the special defence of a Statute of Limitations is sufficient if the statement in the notice follows, without any addition, form 95*a* in the Appendix to the County Court Rules, 1895, which is, "that the claim for which the defendant is summoned is barred by a Statute of Limitation," and the defendant need not specify the particular statute on which he intends to rely.

APPEAL from the Whitchurch (Salop) County Court.

In an action in the county court for money lent, the defendant, following form 95*a* in the Appendix to the County Court Rules, 1895 (1), gave notice of a special defence as follows: "Take notice that the defendant intends at the hearing of this action to give in evidence and rely upon the following ground of defence:—

"That the claim for which the defendant is summoned is barred by a Statute of Limitation."

At the hearing of the action the county court judge held that the defendant was not entitled to rely upon this defence, because the provisions of Order x., r. 18*a* (2), of the same rules had not been complied with, and he gave judgment for the plaintiff.

The defendant appealed.

(1) The County Court Rules, 1895, Order x., r. 14*a*: "Order x., r. 14, and the third paragraph of form 95" (of the County Court Rules, 1889, and the forms in the Appendix thereto) "are hereby annulled; and where a defendant intends to rely on the defence of any Statute of Limitations, his statement shall be according to the form 95*a* in the Appendix."

The statement of the defence of a Statute of Limitations in form 95*a* is: "That the claim for which the defendant is summoned is barred by a Statute of Limitation."

(2) Order x., r. 18*a*: "When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies."

1899

EATON v. TAPLEY.

Lochnis, for the appellant. The defence of a Statute of Limitations was properly stated in the appellant's notice, and the county court judge ought to have allowed that defence to be set up. The County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 76, first required that notice should be given of certain specified special defences (including the defence of any Statute of Limitations), and that section is practically re-enacted by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 82. Rules and forms have from time to time been made and altered by committees of the county court judges with respect to the statement of these special defences. By the Rules of 1875, Order IX., r. 7, the defendant, where he intended to rely upon any of the specified special defences, must file a notice, of which a form is given in the Appendix, form 60; and by rule 11: "Where a defendant intends to rely on the defence of any Statute of Limitations, he shall in his statement state the date from which he relies that the statute began to run." The statement given in form 60 is: "That the claim for which the defendant is summoned is barred by a Statute of Limitation." Rule 14 for the first time required that notice should be given of statutory defences, but only in actions of tort, and provided that the defendant "shall in his statement set forth the year, chapter, and section of the statute on which he relies, or the short title thereof." The Rules of 1886 (Order X., rr. 10, 14), with respect to notices of special defences and of statutory defences in actions of tort, were practically the same, but the form was altered. The statement was (form 95, par. 3): "That the claim for which the defendant is summoned is barred by a Statute of Limitation. [*Here set forth the statute and the date from which it began to run.*]" The same rules and form were continued in the Rules of 1889 (Order X., rr. 10, 14, form 95). It is clear, therefore, that at that time the rules which provided that notice of a statutory defence should be given in actions of tort did not apply to the notice to be given of the defence of any Statute of Limitations. If they did so apply, the defendant, where he gave notice of the defence of any Statute of Limitations in an action of tort, must set forth the year, chapter, &c., of the statute, but need

not set them forth where the action was one of contract. The alterations made by the Rules of 1895 do not make it necessary to set forth the year, chapter, &c. of the statute where the defendant intends to rely on a Statute of Limitations. Rule 18*a* of Order x., does not apply to or affect the special provisions of rule 14*a*. Rule 14*a* and form 95*a*, which has gone back to the form given by the Rules of 1875, contain all that the defendant need comply with. If the form be followed, he has done all that the rules require.

Sims Williams, for the respondent. The county court judge was right. When the Rules of 1895 were made it was necessary, in accordance with the form provided by the Rules of 1889, to give the date when the defendant alleged that the statute began to run. The object in the Rules of 1895 was to bring all statutory defences into harmony, and to render it necessary, with respect to all of them, to describe the statute relied on. The Rule Committee have effected that object by striking out the latter part of the old form and by framing rule 18*a*. Rule 14*a* provides only that the statement shall be "in accordance with" the form. Those words do not mean that the form cannot be added to, and when an addition is rendered necessary, as it is by rule 18*a*, that addition must be made. The same principle has been applied to the Rules of the High Court: *The Isis* (1); *Pullen* v. *Srelus*. (2) The defence of a Statute of Limitations is a statutory defence, and comes within the terms of rule 18*a*.

LORD RUSSELL of KILLOWEN C.J. The point in this case arises upon the County Court Rules, and owing to the fact that they have been altered again and again nobody can say that the point is perfectly plain. I think, however, that it is tolerably plain. It is not necessary to follow out all the earlier evolutions of the rules. I give my judgment upon the effect of the Rules of 1895 as compared with those of 1889. Order x., r. 14, of the Rules of 1889 provided: "Where a defendant intends to rely on the defence of any Statute of Limitations, he shall in his statement specify the date from which he alleges that the

(1) (1883) 8 P. D. 227. (2) (1879) 48 L. J. (C.P.) 394.

1899

EATON v. TAPLEY.

Lord Russell C.J.

statute began to run." Under those rules the form of notice that the defendant intended to rely upon a Statute of Limitation (form 95, par. 3) was: "That the claim for which the defendant is summoned is barred by a Statute of Limitation [*here set forth the statute and the date from which it began to run*]." The obligation, therefore, there was to state what was the statute on which the defendant intended to rely, and when it had begun to run. That was the state of things which the Rule Committee had brought about when the matter was reconsidered in 1895. By Order x., r. 14*a*, of the County Court Rules of that year, Order x., r. 14, of the Rules of 1889, and the 3rd paragraph of form 95, are annulled, and it is provided that, "where a defendant intends to rely on the defence of any Statute of Limitations, his statement shall be according to the form 95*a* in the Appendix." That form is, "That the claim for which the defendant is summoned is barred by a Statute of Limitation." So that the Rule Committee in 1895 expressly and specifically annulled the pre-existing rule and form, and provided that the defendant's statement need only be that the claim against him was barred by a Statute of Limitation. If the matter stood there the point raised would be too clear for argument. But it does not stand there because of rule 18*a* of the Rules of 1895, which provides: "When in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter on which he relies." Again, if rule 18*a* stood alone there would be a great deal to be said for the contention made for the plaintiff. But it does not stand alone because of rule 14*a*. I think the two rules are to be reconciled by treating as excepted from rule 18*a* that which is specifically provided for by rule 14*a*. I therefore think that the county county judge was wrong in holding that the defendant was not entitled to rely upon a Statute of Limitations. Since it is not admitted that the defence of the Statute of Limitations is one which the defendant can make out, if he is entitled to raise it, the case must go back to the county court for a new trial.

DARLING J. I am of the same opinion. Rule 18*a* of the County Court Rules of 1895 would, I think, have applied if provision for this particular case of a defence of the Statute of Limitations had not been made by rule 14*a*. It is impossible to suppose that the Rule Committee, having by rule 14*a* provided that one particular thing should be done, went on to provide by rule 18*a* that another and perfectly different thing should be done. Both the rules cannot, I think, apply; because, if they did, when the defendant followed the form strictly he might be told, in order to defeat his defence, "You ought to have added something more," and if he did add what is required by rule 18*a*, he might be told, "You have not followed the form."

CHANNELL J. I agree with the judgment of my Lord, and I think that this is a case in which the specific direction of the one rule prevails over the general direction of the other.

Appeal allowed; new trial ordered.

Solicitors for appellant: *Rowcliffes, Rawle & Co., for A. E. Whittingham, Nantwich.*

Solicitors for respondent: *Colman & Knight, for Etches & Lee, Whitchurch.*

W. A.

1899
May 1.

BROCK *v.* HARRISON.

Waterworks—"Person supplied with Water"—Suffering Waste—Owner of House not exceeding 10*l. Rent—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 72.

By the provisions of a water company's special Act, if "any person supplied with water" by the company negligently suffered the water so supplied to him to be wasted he was liable to a penalty:—

Held, that where a house was let to a tenant at a rent not exceeding 10*l.*, so that the owner was liable under s. 72 of the Waterworks Clauses Act, 1847, to pay the water rates instead of the occupier, the owner was a "person supplied with water" within the meaning of the special Act, and was under a duty to take care that the water supplied was not wasted.

CASE stated by the stipendiary magistrate for the Staffordshire Potteries District.

An information was laid by the respondent, the engineer of the Staffordshire Potteries Waterworks Company, against the appellant, Sarah Brock, that she, on October 28, 1898, being supplied with water by the said company, unlawfully and negligently suffered a certain pipe to be out of repair, so that the water supplied to her was wasted. The information was laid under s. 51 of the Staffordshire Potteries Waterworks Act, 1853, which provides that "If any person supplied with water shall wilfully or negligently do or suffer any act so that the water supplied to him by the company shall be wasted, or the supply thereof improperly increased, he shall forfeit for every such offence a sum not exceeding five pounds." The appellant was the owner of a certain house, of which one Charles Beech was the tenant. The house was held on a weekly tenancy at a rental under the annual value of 10*l.*, to wit, 3*s.* 0½*d.*, which included the use of water. The Staffordshire Potteries Waterworks Company supplied the water for the said house, and the appellant, as owner, paid the company the rate due for the supply thereof, as provided by s. 72 of the Waterworks Clauses Act, 1847, which is incorporated by the company's special Act above mentioned. The name of the appellant only, and not that of the tenant, appeared in the books of the company as the person liable for the water rate of the said house, and the

appellant was the person receiving the rent of the house from the occupier. For eight weeks or thereabouts a certain service pipe belonging to the appellant used in respect of the supply of water to the house was out of repair and causing a very considerable waste of water. The appellant personally called at the house week by week for the purpose of collecting her rents, and from time to time during the eight weeks the tenant called the appellant's attention to the condition of the pipe, and the consequent waste of water. The tenant made some attempt to prevent the leakage, but without effect. The appellant did not cause the pipe to be repaired, or do anything to prevent the waste of water. The magistrate was of opinion that the appellant was properly charged as the person supplied with water within the meaning of s. 51 of the special Act, and he found that the appellant negligently suffered acts so that the water supplied by the company was wasted. He accordingly convicted the appellant, subject to a case for the opinion of the Court.

Montague Lush, for the appellant. The mere fact that a house is let at a rental of less than 10*l*., so that the owner is liable to pay the water rate under s. 72 of the Waterworks Clauses Act, 1847, does not make the owner a "person supplied with water." The provision that the owner should be liable for the rates in such cases was intended merely to assist the water companies in collecting their rates, and not to affect the question as to who was the person supplied. The words "supplied with water" connote the use of water. Indeed, s. 74 of the Waterworks Clauses Act, 1847, seems distinctly to suggest that an owner who is liable under s. 72 to pay the rate is not ipso facto a person supplied with water, for it draws a distinction between the two classes of persons: "If any person supplied with water by the undertakers, *or* liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate," the undertakers may cut off the water. That Act is incorporated with the special Act, and the same words cannot be construed as having different meanings in different sections. There is no contract between the owner

1899

BROCK v. HARRISON.

and the company whereby the owner purchases the water; there is nothing beyond a bare statutory duty to pay the water rate. The fact that the magistrate has found negligence on the part of the appellant is immaterial; there can be no negligence if there is no duty.

Macmorran, Q.C., and *Montague Shearman*, for the respondent, were not called upon.

DARLING J. I think this appeal must be dismissed. In my opinion the magistrate was right in holding that the owner of this house was a person supplied with water within the meaning of s. 51 of the special Act, and as such liable for negligently suffering the company's water to be wasted. I am far from saying that she was the only person who was supplied with water in respect of this house. It may be that the occupier was also liable under that section.

CHANNELL J. I am of the same opinion. It appears from the case that the magistrate thought that the appellant was *the* person supplied with water. If he meant that she was the only person so supplied, I cannot agree with him.

Appeal dismissed.

Solicitors for appellant: *Purkis & Co., for Sword & Son, Hanley.*

Solicitor for respondent: *W. S. Fiske, for Knight & Sons, Newcastle-under-Lyme.*

J. F. C.

In re RAYNES PARK GOLF CLUB, LIMITED. *Ex parte* OFFICIAL RECEIVER.

1899
March 27.

Company—Winding-up—Costs of Official Liquidator—Right to Appeal—Order to pay Costs personally.

The principle laid down in *In re Silver Valley Mines*, (1882) 21 Ch. D. 381, that an official liquidator ordered to pay costs personally may appeal against such an order, extends to the case of an official receiver ordered to pay costs personally by a county court judge, and enables him to appeal against such an order to the Divisional Court.

APPEAL from the Croydon County Court.

The Raynes Park Golf Club, Limited, was incorporated in 1893, and issued debentures charged on its assets.

On May 19, 1897, the overseers of the poor for the parish of Merton, in which the golf club was situate, made a rate of 65*l.* 0*s.* 9*d.* on the premises of the club. The club having failed to pay, the overseers on October 15 made a levy on the premises; but as it was found that the landlord had taken possession of the premises for rent in arrear, the overseers did not proceed further.

On January 4, 1898, the overseers presented a petition to wind up the club in the Croydon County Court, and a winding-up order was made, the official receiver of the court becoming the liquidator. On April 4 the overseers lodged a proof for 65*l.* 15*s.* 3*d.* for the rate and costs. The official receiver, having realized the assets of the club and deducted expenses properly incurred by him, had in hand for distribution among the creditors a sum of 45*l.* 11*s.* 9*d.*

On September 8, 1898, the debenture-holders obtained judgment against the club in a debenture-holders' action. The official receiver was advised that since debentures had been created charging the whole effects of the club, and having regard to the Preferential Payments in Bankruptcy Amendment Act, 1897, s. 2, the costs of the solicitors to the overseers as petitioning creditors would not rank in priority to the claims of debenture-holders or of the persons entitled to preference by

1899

RAYNES PARK GOLF CLUB, *In re.*

OFFICIAL RECEIVER, *Ex parte.*

s. 1 of the Preferential Payments in Bankruptcy Act, 1888; and in the course of a correspondence which took place between the official receiver and the solicitors to the overseers he informed them of this.

The overseers alleged that the official receiver had been guilty of delay with a view to preferring the claims of the debenture-holders, and on October 15, 1898, they served the official receiver with a notice of motion for an order that he should pay to them out of the moneys in his hands the sum of 65*l.* 0*s.* 9*d.* due for rates, and that he should also pay the costs of and incidental to the application.

On the motion being heard the county court judge made an order directing the official receiver to issue a notice to the preferential creditors calling on them to prove their respective debts before a certain date, and immediately thereafter to pay the preferential creditors whose proofs had been duly admitted out of the moneys in his hands, and he also ordered that the official receiver should personally pay the costs of the overseers of and incidental to the motion.

The official receiver appealed against so much of the order as directed him to pay the costs personally.

Muir Mackenzie, for the appellant. The Court has jurisdiction to entertain the appeal although it is on a question of costs, since a liquidator can appeal against such an order: *In re Silver Valley Mines.* (1)

[He was stopped.]

A. M. White, for the respondents. There is no jurisdiction to entertain such an appeal. Sect. 124 of the Companies Act, 1862, did not purport to give any larger jurisdiction as to appeals in such cases than then existed, and there is nothing in the Companies (Winding-up) Act, 1890, to extend that jurisdiction. The section governing the appeal is, therefore, s. 120 of the County Courts Act, 1888, and there is here no question of law as required by that section. Costs are in the discretion of the Court, and there is no appeal from the exercise of that discretion.

(1) 21 Ch. D. 381.

WRIGHT J. We think that this appeal must be allowed. No doubt the ordinary rule is that there is no appeal to the Divisional Court from the county court except on a question of law, and there is besides a general rule that no appeal lies on a question of costs which are in the discretion of the Court, unless it can be shewn that the Court has gone wrong on some question of principle. Here the order as to costs is divisible. It is, first, an order that the official receiver shall not get any costs; and, secondly, it is an order that he shall personally pay the costs.

I do not think that we can interfere with so much of the order as directs that he shall not get any costs. That is an order made in the discretion of the Court, and I do not think that we have any right to alter it.

But as to the other part of the order, I think it is a matter of law. To visit an official receiver with an order to pay costs personally seems to me tantamount to a declaration that he has been guilty of misconduct; and if such a declaration is made without any evidence to support it, I think that an appeal will lie.

Here we think that there was no evidence which would entitle the county court judge to say that the official receiver had been guilty of misconduct. I think, therefore, that there was no ground for ordering the official receiver personally to pay costs, and so far as the order of the county court judge does so this appeal must succeed.

BIGHAM J. concurred.

Appeal allowed.

Solicitor for appellant: *Solicitor to Board of Trade.*
Solicitors for respondents: *Bryson & Wells.*

A. P. P. K.

1899
April 11.

THE QUEEN *v.* STEWART.

Ship—Engaging Seamen for Foreign Ship—Fine—Civil Debt—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 111.

The prohibition contained in s. 111 of the Merchant Shipping Act, 1894, against unauthorized persons engaging seamen to be entered on board any ship in the United Kingdom, applies where the ship for which the seamen are engaged is a foreign ship.

The fine imposed by that section for its contravention is a punishment for an offence, and is not recoverable as a civil debt.

RULE NISI for a certiorari to the stipendiary magistrate of the city of Liverpool, calling upon him to shew cause why two convictions should not be quashed.

It appeared that on September 28, 1898, one Julius Olsen was charged before the stipendiary magistrate of the city of Liverpool, for that he on September 10, not then being a person holding a licence to engage seamen or apprentices for merchant ships in the United Kingdom, and not being the owner, master, or mate of the ship, or bonâ fide a servant of and in the constant employment of the said owner, or a superintendent, unlawfully did engage two seamen named Innes and Cottrell to be entered on board a certain ship called the *Cearense*, then lying at Port Glasgow.

It was contended on behalf of Olsen that as the *Cearense* was not a British ship (which was admitted) there was no offence, and the magistrate had no jurisdiction. The magistrate, however, overruled this contention, and, the facts being admitted, convicted Olsen of the offence and imposed a fine in each case of 5*l.* and 4*s.* 6*d.* costs, and the convictions went on: "And in default of payment it is adjudged that the sums due under this adjudication be levied by distress and sale of the defendant's goods, and in default of sufficient distress that the defendant be imprisoned in Her Majesty's Prison at Walton, and there kept for the space of one calendar month, unless the said sum and all costs and charges of the said distress and commitment and of his conveyance to the said prison be sooner paid."

1899

REG. v. STEWART.

Olsen then obtained this rule on the grounds that the magistrate had no jurisdiction, the *Cearense* not being a British ship, and that, as the fine was recoverable only as a civil debt, the convictions were bad for awarding imprisonment without proof of means.

H. Sutton (*A. G. Steel* with him) shewed cause. The convictions were good. Sect. 111 of the Merchant Shipping Act, 1894 (1), applies to foreign vessels as well as to British vessels. No doubt some of the sections in Part II. of the Act apply only to British vessels; but the sections relating to the offence of crimping, of which s. 111 is one, apply to foreign vessels also. It has been so held in Scotland: *Hart* v. *Alexander* (2), and there was a similar decision on a former Act in *The Milford*. (3) Sects. 260 and 261 of the Act of 1894, which are headed "Application of Part II.," apply that part (which includes s. 111) to ships registered in the United Kingdom, and to British ships registered out of the United Kingdom; but they do not exclude that part of the Act from applying to foreign ships. Sect. 265 does not apply, since this provision does not give rise to a conflict of laws. The magistrate, therefore, had jurisdiction.

Secondly, the fines imposed were punishments for offences and not civil debts. By s. 111, sub-s. 4, it is called a fine for an offence, and by s. 680, sub-s. 1 (*b*), an offence made punishable by a fine shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts. It is true that by s. 681, sub-s. 2, "Where under this Act any sum may be recovered as a fine under this Act, that sum, if recoverable before a court of summary jurisdiction, shall in England be recovered as a civil

(1) By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 111, sub-s. 1, "A person shall not engage or supply a seaman or apprentice to be entered on board any ship in the United Kingdom, unless that person either holds a licence from the Board of Trade for the purpose, or is the owner or master or mate of the ship, or is bonâ fide the servant and in the constant employment of the owner, or is a superintendent."

Sub-s. 4: "If a person acts in contravention of this section, he shall for each seaman or apprentice in respect of whom an offence is committed be liable to a fine not exceeding 20*l*."

(2) (1898) 36 S. L. R. 64.

(3) (1868) Swab. 362.

1899

REG. v. STEWART.

debt"; but that section refers, not to fines for offences, but to sums made recoverable, as fines under the Act are recovered, such as are imposed by s. 582, sub-s. 5; s. 649, sub-s. 1 (*b*), and s. 667, sub-s. 4. None of these are fines for offences, but they are expenses or payments which may be recovered in the same manner as fines may be recovered under the Act, that is to say (by s. 681, sub-s. 2), as civil debts.

Horridge, in support of the rule. *The Milford* (1) is not in point. The section there under consideration gave a remedy against the ship in rem, and the question was therefore governed by the lex fori and not the lex loci. *Hart* v. *Alexander* (2) is not binding on this Court.

Primâ facie s. 111 cannot apply to foreign ships. The Legislature cannot have intended to interfere with foreign vessels engaging crews in any way most convenient to them. Sects. 264 and 265 shew that primâ facie the provisions of Part II. were only intended to apply to British ships. It is immaterial that s. 111 uses the words "any ship," since those words are frequently used in Part II. of the Act in cases where they can only refer to any British ship—e.g., ss. 217 and 218. It is plain from s. 219 that these provisions, though apparently relating to "any ship," can only be made to apply to a foreign ship under certain circumstances and by an Order in Council.

Sutton, replied.

DARLING J. This question comes before us on an application for a certiorari to quash the conviction, and two points are raised. The facts are practically the same as in the case of *Hart* v. *Alexander* (2), which was decided in the Scottish Court of Session. A person who is apparently a foreigner not holding any licence from the Board of Trade has engaged or supplied seamen to serve upon a foreign ship in an English port. It is admitted that if the ship had been an English ship he would have committed an offence under s. 111 of the Merchant Shipping Act, 1894, but it is contended that no offence was committed, since it was a foreign ship. The words of the statute are: "A person shall not engage or supply a seaman or

(1) Swab. 362. (2) 36 S. L. R. 64.

apprentice to be entered on board any ship in the United Kingdom unless that person either holds a licence from the Board of Trade, or is the owner or master or mate of the ship, or is bonâ fide the servant and in the constant employment of the owner, or is a superintendent."

It is said that the expression "any ship" does not cover the case of any ship but an English ship—that is to say, that it must be read as if it were "any British ship," and that that is so because of ss. 260 and 261 of the same statute. In the case of *Hart* v. *Alexander* (1) the very same question arose, and it was there contended that ss. 260 and 261 gave to foreign ships a liberty to do that in English ports which English ships were forbidden to do. If this is so, the Merchant Shipping Act of 1894, which was intended to be a codifying Act, would have protected English sailors or any sailors in an English port against what is known as crimping if the crimping was performed for the benefit of an English, but would not have protected them if that operation was for the benefit of a foreign, ship. It would take very strong language in the Act of Parliament to compel me to come to such a conclusion. I cannot think that ss. 260 and 261 were intended to have any such meaning. I do not think that they distinguish between British and foreign ships. As it seems to me, those sections distinguish not between British and foreign ships, but between British ships registered in England and British ships registered elsewhere.

For my own part, I am content to adopt as my judgment the language used by Lord Moncreiff in *Hart* v. *Alexander* (2): "The second part of the Act," which includes s. 111, "contains a variety of provisions. Some of them are expressly applicable only to British ships, and some are made applicable also to foreign ships; but there is a third class of provisions which are quite irrespective of the nationality of the ships or seamen. The sections founded on in this complaint belong to that class." Therefore, I think we have only to give the natural meaning to the words "any ship in the United Kingdom." It seems to me that there is nothing in this statute to

(1) 36 S. L. R. 64. (2) 36 S. L. R. 64, at p. 66.

1899

REG. v. STEWART.

Darling J.

prevent those words as used in s. 111 from having their ordinary meaning, and that they therefore apply to a foreign ship in an English port just as much as to an English ship.

With regard to ss. 217, 218, 219, the argument is that because the means given by s. 219 of applying certain provisions of the statute have not been taken, that they therefore do not apply to the particular nation to which this ship belonged. But by s. 219 it is provided, "Whenever it is made to appear to Her Majesty that the government of a foreign country (*a*) has provided that unauthorized persons going on board British ships which are about to arrive, or have arrived, within the territorial jurisdiction, shall be subject to provisions similar to those of the last preceding section, which are applicable to persons going on board British ships at the end of their voyage, and (*b*) is desirous that the provisions of the said section shall apply to unauthorized persons going on board ships of that foreign country within British territorial jurisdiction, Her Majesty in Council may order that those provisions shall apply to the ships of that foreign country, and have effect as if the ships of that country arriving, about to arrive, or having arrived, at the end of their voyage were British ships." Sect. 218, to which s. 219 refers, prohibits persons from going on board a ship at the end of her voyage without being duly authorized, and the effect of s. 219, therefore, is that where something has been done in a foreign port to prevent people going on board an English ship for the purpose of swindling or robbing English sailors, Her Majesty has power given to her to order in council the same kind of protection to foreign ships in English ports against English persons desiring to go on board such ships for that purpose. But this is not a question of going on board. Here the business was carried on on shore. It may be that the words are wide enough to prevent a person from carrying on such a business on board; but I do not think that such a case is likely to occur, because anybody could go on board a foreign ship and be engaged, not by a person having a Board of Trade licence, but by a person coming within the other exemption, as the master of the ship, or a person constantly employed on board the ship

1899

REG. v. STEWART.

Darling J.

by the owners. It is clear that s. 111 is aimed really against persons carrying on such a business on shore. I think that the conviction on that point was perfectly right.

But it is further said that the conviction should be quashed because the penalty imposed could only be recoverable as a civil debt. Sect. 111, sub-s. 4, says: "If a person acts in contravention of this section, he shall for each seaman or apprentice in respect of whom an offence is committed be liable to a fine not exceeding 20*l.*"; and s. 680, which provides for the prosecution of offenders, says (sub-s. 1 (*b*)): "An offence under this Act made punishable with imprisonment for any term not exceeding six months, with or without hard labour, or by a fine not exceeding 100*l.*, shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts." It is quite clear that the Act contemplates two classes of offences. This is an offence punishable by a fine, and it is said that a fine under the Act is only recoverable as a civil debt, and we were particularly referred to ss. 582, 649, 667. I would point out that, although in those cases the fine may be only recoverable as a civil debt, yet in none of them is the fine spoken of as the result of an offence. Here the fine was the punishment of an offence punishable by fine, and was not in the nature of a civil debt. I therefore think that the sentence was right, and that the rule for the certiorari must be refused.

CHANNELL J. I am of the same opinion on both points. As to the first point, the applicability of these particular sections to foreign ships in English ports, the matter stands thus: Sect. 111 is in its language quite wide enough to apply to foreign ships as well as to English ships, and no reason has been shewn why we should restrict that meaning. It is contended that ss. 260 to 266, which are headed "Application of Part II.," do not apply to foreign ships. On that point I might content myself with the judgments of the Court of Session, but I think that the observations of Dr. Lushington in *The Milford* (1) are very much in point. He there says that the words in the section which he had before him, and which correspond to

(1) Swab. 362.

1899

REG. v. STEWART.

Channell J.

ss. 260 and 261 of the Act of 1894, are affirmative words stating the cases to which the part of the Act shall extend, and not negative words restraining the application of the Act.

It seems to me that ss. 260 to 266 must be construed as if they began, "And with respect to the application of Part II. to ships registered in the United Kingdom, be it enacted as follows," and then set out ss. 260, 262, and 263. The effect would be that the whole of Part II. applies to those ships except as to the three classes of ships as to which only portions apply. Then there is provision as to the applicability of Part II. to British ships registered in British dependencies, and the special enactments of ss. 261 and 264, that a portion of Part II. applies to all such ships, and that certain other portions apply only if the Colonial Legislature should desire and should pass a corresponding Act. In that way provision is made for British ships registered in the United Kingdom and British ships registered in the colonies; but there is no provision as to foreign ships, and if the matter stood there it would be necessary to consider on the words of each particular section in Part II. whether it applied to foreign ships or not. But the matter does not stand there, for there is s. 265, which says, as I think, that with respect to the application of Part II. to foreign ships, if the matter is one which might give rise to a conflict of laws, then if there is no express application of the particular portion of Part II. to foreign ships, it shall not be so applied; but if it is by the terms of the section expressly applied to foreign ships, then it must be so construed, even although it gives rise to a conflict of laws, because it is express legislation. If, however, the words are general, and the matter is not one which would give rise to a conflict of laws, then the general words must be applied in a general way. That leaves the matter free from difficulty. Of course, our Legislature would not desire to make enactments except on special matters relating to things to be done on a foreign ship. Therefore it seems a fair construction to say that, with regard to matters to be done on board ship, the sections do not apply to foreign ships unless they are expressly made so to apply; but where the words are general, and are not such as to cause

a conflict of laws, then there is no reason why such provisions should not apply to foreign vessels also. There is no possible reason why s. 111 should not apply to seamen engaged for a foreign ship as much as to seamen engaged for an English ship. Why should a seaman lose the protection given by the section if he is shipped on board a foreign ship? There seems to me to be no reason for saying that the section does not apply where a seaman is engaged for a foreign ship on shore. If he were to be engaged on board the foreign ship, possibly a conflict of laws might arise, and there might be a question whether a conviction would be right; but that is not the case before us. The seaman here was engaged on shore, and contrary to the provisions of s. 111; and therefore I think that, although he was engaged for a foreign ship, the conviction was right and must be affirmed.

As to the point taken about this being a civil debt, I do not feel any difficulty. Until Mr. Sutton called our attention to ss. 582, 649, and 667, it was not quite easy to understand s. 681, sub-s. 2; but the moment we considered those sections it became quite simple.

Sect. 681 merely says that, whereas certain things which are civil debts have been declared by this Act to be recoverable as if they were not civil debts, but were fines, such sums shall be recoverable as if they were civil debts. That does not apply to a fine which is the punishment of an offence, as my brother has pointed out. I think, therefore, that on both points the rule must be discharged.

Rule discharged.

Solicitors for applicant: *Nordon & De Frece, for Beasley, Liverpool.*

Solicitor for respondent: *The Solicitor to the Board of Trade.*

A. P. P. K.

1899
April 12.

THE GREATER LONDON PROPERTY COMPANY, LIMITED (OWNER OF 238, OLD FORD ROAD) *v.* FOOT.

Metropolis—Management Acts—Nuisance—Sewer—Drain—Drainage of Group of Houses by Combined Operation—Order of Local Authority—Subsequent Deviation—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

In 1879 an order of the vestry was obtained under the Metropolis Local Management Act, 1855, for draining a group of eleven houses by a combined operation. It was subsequently discovered that there had been a deviation in the course of the drain from the plan signed by the surveyor, but there was no evidence that any houses other than those on the plan were drained by the combined operation :—

Held, that a mere deviation in the course of the drain was not sufficient to convert it into a sewer, and that the vestry was not therefore liable for its repair.

SPECIAL CASE stated by a metropolitan police magistrate.

The appellant, the Greater London Property Company, Limited, was the owner of 238, Old Ford Road, in the parish of St. Matthew, Bethnal Green, and was summoned by the respondent, who was the chief sanitary inspector for that parish, for having neglected to abate a nuisance connected with the drainage of those premises.

At the hearing of the summons the existence of the nuisance was admitted, and it was also admitted that it proceeded from pipes conveying drainage under No. 238; but it was contended that these pipes formed a sewer repairable by the local authority, and not a drain repairable by the owner of the premises.

The contention for the respondent was that the pipes as laid formed a drain for draining a group or block of houses by a combined operation under the order of the vestry, and that therefore it was a drain within s. 250 of the Metropolis Management Act, 1855, and as such repairable by the owner of the premises.

The register of applications to the vestry by persons desirous of draining houses by a combined operation was produced, and it contained a plan dated June 27, 1879, and signed by the

surveyor, shewing a scheme of draining a block or group of eleven houses, including the house in question, by a combined operation. The register contained no formal order upon the subject, and it was proved that it was the practice of the vestry to treat a plan so signed as being approved by the vestry and as giving the authority of the vestry to the proposed scheme without any formal order.

If the pipes for this scheme had been laid as shewn on the plan, they would, after collecting the drainage from the various houses, have passed by making a slight bend under 236, Old Ford Road, which was the house immediately adjoining 238, Old Ford Road. On an examination being made to discover the source of the nuisance, it was found that the pipes were continued in a straight line and passed under 238 and so into the main sewer, thus giving a better flow by doing away with the bend and entering the main sewer at a lower level, causing a better fall. There was no record in the register of any such deviation being sanctioned, and it was not shewn that there was not any other deviation from the plan, nor was it shewn that any houses other than those on the plan were drained by the combined operation. The magistrate was of opinion that the plan had been duly approved by the vestry and amounted to an order under s. 250, and that the alteration in the course of the pipes did not alter the character of the drain, and that the drain did not by such alteration cease to be a drain for draining a group of houses by a combined operation under the order of the local authority, and as such repairable by the owner of the premises. He therefore ordered the appellant to abate the nuisance.

Packard, for the appellant. This was a sewer and not a drain, and was therefore repairable by the vestry. By s. 250 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), the word "drain" "shall include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board, and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid

1899

GREATER LONDON PROPERTY COMPANY v. FOOT.

applies." The contention for the respondents is that this is a drain for draining a group of houses by a combined operation under the order of the vestry, but there was no such order here. If the plan signed by the surveyor amounted to evidence of an order that plan has been deviated from, and the pipes as they exist were not laid in accordance with the order. Sect. 73 contemplates deviations in the making of a drain; but such deviations can only be made by the order of the vestry. The Court cannot assume such an order: *Bethnal Green Vestry* v. *London School Board*. (1) If a drain for draining more than one house is made without the order of the local authority it is a sewer and not a drain: *Kershaw* v. *Taylor* (2); *Holland* v. *Lazarus* (3); *Florence* v. *Paddington Vestry* (4); and so also where there has been an unauthorized alteration of a drain made under the order of the vestry for draining a group of houses by a combined operation: *Geen* v. *Newington Vestry*. (5)

Avory, for the respondent. The cases establish that there must be some evidence of an order of the local authority for draining a group of houses by a combined operation under s. 74; but if there is such an order the drain is a drain and not a sewer. Where, however, the drainage of other houses has been introduced into such a drain, it becomes a sewer. That is the effect of all the decisions. Here it is a mere question of deviation, which in itself is not sufficient to convert the drain into a sewer. The only order contemplated by the Act is an order for draining a group of houses by a combined operation, and the local authority cannot dictate the line in which the pipes of such a drain shall be laid so long as they are laid at the proper level and with the proper fall, nor is the sanction of the vestry requisite for any slight deviation from the course of such a drain as shewn on the approved plan.

Packard, replied.

DARLING J. In this case we are asked to say that the magistrate was wrong in holding that the conduit in question

(1) [1898] A. C. 190.
(2) [1895] 2 Q. B. 471.
(3) (1897) 66 L. J. (Q.B.) 285.
(4) (1895) 12 Times L. R. 30.
(5) [1898] 2 Q. B. 1.

—to use a neutral word—was a drain, and not a sewer, and was therefore not vested in the local authority. The question arises mainly under s. 250 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), which provides that the word "drain" shall include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board. It is contended that the conduit in question is a drain within the meaning of that definition. Admittedly it does drain a group or block of houses, and the question is whether it does so under the order of the vestry. As to that the facts as contained in the special case are as follows: The register of applications to the vestry by persons desirous of draining houses by a combined operation was produced before the magistrate, and it contained a plan dated June 27, 1879, and signed by the surveyor, shewing a scheme for draining a block or group of eleven houses, including the house in question, by a combined operation. The register contained no formal order upon the subject, and it was proved that it was the practice of the vestry to treat a plan so signed as being approved by the vestry, and as giving the authority of the vestry to the proposed scheme without any formal order. The first question that occurs is whether the drain as shewn on the approved plan signed by the surveyor amounts to an order by the vestry for a drain for draining a block of houses by a combined operation, or whether a formal order is necessary. As to that, I think *Geen* v. *Newington Vestry* (1) and *Bateman* v. *Poplar District Board of Works* (2) are decisive that the plan is sufficient evidence that the requisite authority had been given for the construction of a drain for draining this group of houses by a combined operation.

But then comes the further question. It is plain that the order for draining these houses by a combined operation was not carried out altogether in accordance with the approved plan, and the question is whether that deviation from the plan is sufficient to take this conduit out of the exception made by the Act in regard to drains by a combined operation, and to make it a sewer repairable by the local authority. As shewn

(1) [1898] 2 Q. B. 1. (2) (1886) 33 Ch. D. 360.

1899

GREATER LONDON PROPERTY COMPANY v. FOOT.

Darling J.

on the plan, the conduit in question would have made a bend and gone under No. 236, Old Ford Road, whereas in fact it appears that it now goes quite straight and passes under No. 238. It is admitted that it drains precisely the same number of houses—the same group of houses, that is to say—that were to be drained according to the plan, and that the only difference is that, whereas on the plan there was a bend in it, it now goes practically straight. It is contended that the deviation from the plan, however, is a sufficient alteration to compel us to say that the conduit in question passing under No. 238 is not part of the combined operation ordered by the vestry.

In all the cases which have been cited to us in support of this contention, it was not a question of a deviation or alteration in the course of the drain, but of an alteration in the block or group of houses which the vestry had ordered to be drained by a combined operation, and what was decided in those cases was that where the drainage of more houses than the block or group specified in the order was taken into the drain, then it ceased to be a drain, and became a sewer. If in this case another house than the eleven specified in the order had been allowed to drain into this conduit, I do not say that those cases would not have compelled us to come to a different decision; but where, as is the case here, there is no evidence of any alteration in the block or group of houses ordered to be drained, but merely a deviation in the course of the drain, I do not think that those cases apply. Again, if at the time the drain for draining these houses by a combined operation was authorized, Nos. 236 and 238, Old Ford Road, had been the property of different owners, then it is possible that such an alteration in the course of the drain might have had another effect; but, as a matter of fact, both then and now, those two houses were and are the property of a common owner, and the magistrate finds that there is no material difference whether the drain is carried under No. 236 or No. 238. Therefore, as it seems to me, there is nothing in the alteration to make the conduit in question unauthorized by the vestry and to turn it from a drain into a sewer. As the whole property belonged to one common

owner, he could, I think, direct the course of the drain in any manner that was most convenient to him. I am inclined to agree with the contention that under ss. 73 and 74 of the Metropolis Local Management Act, 1855, the only order contemplated is an order for the combined drainage of a specified group of houses, and that, so long as the scheme for draining those houses by a combined operation is practically carried out, a slight deviation from the direction of the drain as shewn on the approved plan is immaterial.

As to the suggestion that the two houses Nos. 236 and 238 may some day be in different hands, I cannot see how that makes any difference. Whether the conduit in question is a drain or a sewer, its character cannot be altered by a change of ownership of the ground through which it passes; and it seems to me that it is in fact a drain for draining a group of houses by a combined operation under the order of the vestry, and that, therefore, whatever happens as to the ownership of the property, a drain it will remain.

CHANNELL J. I am of the same opinion. By s. 250 of the Metropolis Local Management Act, 1855, out of the definition of "sewer," as including sewers and drains of every description, there must be excepted drains used for the drainage of one building only, and also drains used for draining a group of houses by a combined operation under the order of a local authority. When an order is got for such a drain, that is to be treated as a drain, and not a sewer. It seems to me that it must be regarded as if it were the drain of one building only, and that (provided, of course, that the requirements of the vestry as to fall and deviation are complied with), the owner making such a drain has just as much right to make alterations or deviations in the course of the drain as he would have if the drain were draining one separate building. There seems to me nothing in the sections which have been cited to us to prevent him from correcting or straightening any inconvenient curve in the drain, as was the case here. We have no evidence as to the time at which the alteration from the course of the drain as shewn on the plan was made. Possibly the surveyor

1899

GREATER LONDON PROPERTY COMPANY v. FOOT.

Channell J.

suggested it at the time the drain was being laid, or it may have been done at any subsequent time. That, however, seems to me to make no difference.

It would, I think, be a very strange thing if an owner, by altering or deviating from the plan of the combined operation for draining a group of houses as approved by the vestry, could shift the burden of repairing such a drain from his own shoulders to those of the public, and I cannot believe that that is the effect of the Act. As my brother has pointed out, in all the cases which have been cited to us in support of this contention there had been an addition to the group or block of houses drained by the combined operation, and they are, therefore, no authority for saying that a mere deviation in the course of the drain is sufficient to make it a sewer. It does not seem to me that a mere alteration in the mode in which the combined operation is carried out is sufficient to put the drain outside the order of the vestry, and to make it into a sewer. In my opinion, therefore, the magistrate was right.

Appeal dismissed.

Solicitors for appellant: *Stanley Evans & Co.*
Solicitor for respondent: *Robert Voss.*

A. P. P. K.

SYKES AND ANOTHER *v.* SOWERBY URBAN DISTRICT COUNCIL.

1899
April 12, 13.

Local Government—Sewer—Vesting in Local Authority—Sewer made by Landowner "for his own Profit"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-s.* 1.

A sewer made by the owner of a quarry for the purpose of carrying off surface water coming on to his land, and thus preventing it from entering and flooding the quarry, is not a sewer made by any person for his own profit within the meaning of s. 13, sub-s. 1, of the Public Health Act, 1875.

APPEAL from the county court of Yorkshire holden at Halifax.

The plaintiffs were the owners of a quarry. Some sixteen years ago their predecessors in title had constructed a drain to collect into one channel and carry into a public sewer the surface and rain water which came on to their land down a flagged lane known as Carr Lane, and which but for being so collected and carried off would have run into the quarry. As the plaintiffs' quarry workings advanced they from time to time altered the course of this drain. The defendants, who were the local sanitary authority, in 1896 turned a current of admittedly polluted water into this drain for the purpose of enabling it to pass through it into the public sewer.

The plaintiffs then brought this action in the county court for damages, and for an injunction. The defendants contended that the drain was a sewer vested in them, and was not the private drain of the plaintiffs.

The county court judge held that the drain fell within the exception given by s. 13, sub-s. 1, of the Public Health Act, 1875 (1), of sewers made by any person for his own profit, and gave judgment for the plaintiffs. The defendants appealed.

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 13, "All existing and future sewers within the district of a local authority, together with all buildings, works, materials, and things belonging thereto, except

"(1.) Sewers made by any person for his own profit . . . . shall vest in and be under the control of such local authority."

1899

SYKES v. SOWERBY URBAN COUNCIL.

Lawson Walton, Q.C. (*W. J. Waugh* with him), for the appellants. This was a sewer vested in the local authority, and they had, therefore, a right to deal with it. It falls within the definition of "sewer" given by s. 4 of the Public Health Act, 1875, and the authorities shew that it is not a sewer made by any person for his own profit, and therefore not within the exception given by s. 13, sub-s. 1: *Acton Local Board* v. *Batten* (1); *Bonella* v. *Twickenham Local Board* (2); *Ferrand* v. *Hallas Land and Building Co.* (3) The word "profit" in the section means something more than the greater convenience of enjoyment of the premises drained. If the water carried by the sewer is used for a profitable purpose, as in *Croysdale* v. *Sunbury-on-Thames Urban Council* (4); or if a rate is charged for the use of the sewer, as in *Minehead Local Board* v. *Luttrell* (5), then it is a sewer made for profit within the meaning of the exception; but that is not the case here. [He also cited *Durrant* v. *Branksome Urban District Council.* (6)]

Butcher, Q.C. (*T. F. Byrne* with him), for the respondents. This is a sewer made for the profit of those making it, and is, therefore, not vested in the local authority. A distinction must be drawn between house drains used for carrying off sewage from houses and agricultural drains used for draining land or for carrying off surface water which may come on to such land. Both may be sewers within the meaning of the Public Health Act, 1874; but the latter, being made for the more beneficial occupation of the land, are made for the profit of the person making them, and are, therefore, not vested in the local authority. The cases of *Acton Local Board* v. *Batten* (1), *Bonella* v. *Twickenham Local Board* (2), and *Ferrand* v. *Hallas Land and Building Co.* (3), were all cases of house drains. The drains are as necessary a part of a house as the chimneys, and there is besides a duty on the owner of houses to carry off the sewage, which can be enforced under s. 23 of the Public Health Act, 1875. The drains made by him, therefore, for that purpose cannot be said to be made for his profit unless, as in *Minehead*

(1) (1884) 28 Ch. D. 283.
(2) (1887) 18 Q. B. D. 577.
(3) [1893] 2 Q. B. 135.
(4) [1898] 2 Ch. 515.
(5) [1894] 2 Ch. 178.
(6) [1897] 2 Ch. 291.

Local Board v. *Luttrell* (1), he charges a sewer rate for their use. But the exception is expressly intended to cover the case of agricultural drains and drains for surface water. If all such drains are to be held to vest in the local authority, there will be a great interference with private rights, since the landowner will not be able to divert them without the consent of the local authority, who will be able to turn polluted water into them. Besides this, an intolerable burden will be thrown on the local authorities if they have to keep all such drains in repair. The principle of the decision in *Croysdale* v. *Sunbury-on-Thames Urban District Council* (2) was not that the water carried by the sewer was used for a profitable purpose, but that the sewer was made to enable the land to be occupied more profitably, or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, as was the case here. The word "profit" is not restricted to a direct money payment, as in *Minehead Local Board* v. *Luttrell*. (1) That was laid down in *Ferrand* v. *Hallas Land and Building Co.* (3) both by Lopes L.J. (4) and by A. L. Smith L.J. (5)

Durrant v. *Branksome Urban District Council* (6) is not in point, since it was a decision on ss. 15, 16, and 17 of the Act.

Lawson Walton, Q.C., in reply. *Durrant* v. *Branksome Urban District Council* (6) decides that sewers under the Act include those for the removal of surface water as well as those for carrying off sewage. There is no authority for drawing a distinction between such sewers. Possibly an agricultural drain merely conducting surface water to a ditch at the side of a field might not be a sewer within the Act. That is not the case here. The sewer in question communicated directly with a public sewer which was admittedly vested in the local authority.

DARLING J. In this case, after a great deal of difficulty and with much hesitation, I have come to the conclusion that the appeal must be allowed, since I think that on the whole the sewer in question was not made for the profit of the person

(1) [1894] 2 Ch. 178.
(2) [1898] 2 Ch. 515.
(3) [1893] 2 Q. B. 135.
(4) [1893] 2 Q. B. 141, 142.
(5) [1893] 2 Q. B. 144.
(6) [1897] 2 Ch. 291.

1899

SYKES v. SOWERBY URBAN COUNCIL.

Darling J.

making it, and does not therefore come within the exception of s. 13, sub-s. 1, of the Public Health Act, 1875.

The sewer seems to have been made some time ago in order to carry off the surface water which ran down a certain flagged lane known as Carr Lane, and was thus brought on to the plaintiffs' land, and unless it had been carried off by this sewer would have run into the plaintiffs' quarry. No doubt if the water had got into the quarry the working out of the minerals in that quarry would have been more expensive and less profitable to the plaintiffs, and in that sense the plaintiffs may be said to have profited by making the sewer. On the other hand, it is clear that the plaintiffs derived no direct profit from the sewer, since they did not use the water carried by it for any profitable purpose; but there can be no doubt that if the water had been allowed to flow into the quarry it would have been an absolute detriment. Supposing that it had got into the quarry and a pumping engine had become necessary in order to get it out again, it would be difficult to say that such an engine was not used for the plaintiffs' profit in the ordinary meaning of the word; and if this is true of the engine which removes the water from the quarry, why should it not also be true of the sewer which prevents the water from getting into the quarry? The answer is, I think, to be found in the cases which have been cited to us. In *Ferrand* v. *Hallas Land Co.* (1) A. L. Smith L.J. says (2): "It is, however, not necessary to speculate what would or would not be a 'sewer made by a person for his own profit,' for I am clearly of opinion that a sewer made merely for the purpose of draining premises, and for no other purpose (as in the present case), is not 'a sewer made for profit' within the meaning of the exception; first, because it does not come within the ordinary meaning of the terms used; and, secondly, because, as was pointed out by Kay J. in *Acton Local Board* v. *Batten* (3), and by Fry L.J. in *Bonella* v. *Twickenham Local Board of Health* (4), if it did 'the exception would almost eat up the rule.'" That is my difficulty. If we were to hold such a drain as the one in question to be made by a

(1) [1893] 2 Q. B. 135.
(2) [1893] 2 Q. B. 144.
(3) 28 Ch. D. 283.
(4) 20 Q. B. D. 63, at p. 65.

person for his own profit it would be giving to the word "profit" the meaning of "benefit," and would be allowing the exception to eat up the rule. Every drain that is made is for the benefit of, or with the intention of benefiting, the person making it, and there must, therefore, be some restriction. In *Minehead Local Board* v. *Luttrell* (1) Romer J. said (2): "This is a case where the defendant has laid out money for the purpose of making sewers, intending to be compensated and paid directly for his expenditure on the sewers by receiving payments from all persons, whether they are his tenants or not, who avail themselves of the benefit of his sewers, and where he intended to receive, and did receive, payment direct to him from the person using his sewers for the benefit of his sewers, and where he has, by reason of his expenditure, received direct remuneration for the expenditure in the way I have indicated." He therefore held that the drain there in question fell within the exception, on the ground that it directly and not indirectly brought in compensation for the expenditure, and therefore profit, and not a mere benefit to the person making the sewer. As it seems to me a direct benefit may be described as a profit, but an indirect benefit cannot; and therefore, if the making of the drain only gives an indirect benefit to the person making it, the drain does not fall within the exception in s. 13.

The decision most in favour of the respondents' contention is that of Stirling J. in *Croysdale* v. *Sunbury-on-Thames Urban District Council.* (3) He says (4): "When the object of making the sewer is not either for sanitary or ordinary drainage purposes, but to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the profit of the occupier." If those words are taken by themselves, they are amply wide enough to cover this case. This sewer was not made for sanitary or ordinary drainage purposes, but to protect the quarry from water, and so to avoid an expenditure which would otherwise have to be incurred in order that the

(1) [1894] 2 Ch. 178.
(2) [1894] 2 Ch. at p. 182.
(3) [1898] 2 Ch. 515.
(4) [1898] 2 Ch. at p. 519.

1899

SYKES v. SOWERBY URBAN COUNCIL.

Darling J.

occupation of the quarry might be equally beneficial, because unless the sewer had been made the water would have run into the quarry and interfered with the working. But we must see the subject-matter with which Stirling J. was dealing in that case. The drain there was laid not merely for the purpose of carrying water off the owner's land, but in order to convey it to a pond where it might be used for watering cattle, thus obviating the necessity of an expenditure for water for the cattle; and therefore Stirling J. held that it was made for profit within the meaning of the exception. So, as it seems to me, although the words I have quoted if taken alone are wide enough to cover such a case as this, yet they were not intended to apply to it, and in fact form no authority.

For the reasons I have given, although as I have said with great hesitation, I am of opinion that this appeal must be allowed.

CHANNELL J. I am of the same opinion, and, as I entirely agree with what has been said by my brother, I do not think it necessary to go at all fully into the matter. In this expression, "sewers made for profit," some advantage other than the advantage derived from using a sewer or drain simply as a sewer or drain must be implied. If a drain is made merely to drain land or to take away water that comes on to the land, that is only the ordinary purpose for which a drain is made, and the cases shew that the advantage derived in such a way is not sufficient to constitute profit within the meaning of the exception. That is most clearly laid down in cases of ordinary house drainage where the drain is laid down for the purpose of carrying off sewage. It has been ingeniously suggested, however, in the course of the argument that the reason that there is no profit within the meaning of the exception in making such a drain is because there is a duty and a necessity on the owner of a house to make drains to carry off the sewage, but that that reasoning cannot apply where the drain is constructed only to carry away surface water. As far as I can see, that distinction is fallacious. The term "sewer" applies equally to drains used for carrying sewage and drains for surface water.

I quite agree that if the question were an open one there might be a good deal to be said in favour of this sewer, which was for the benefit of the quarry, being one made for profit; but I think that the result of the decisions on the subject is that we are bound to hold that it was not made for profit within the meaning of the exception, and to say that the county court judge was wrong.

No doubt, as a general rule, law, as the respondents' counsel says, is reasonable, and if an interpretation of a statute seems to make it unreasonable, that interpretation is probably wrong; but in order to bring that maxim into effect, it is necessary that the interpretation should be unreasonable in ordinary cases. Where, as here, there is an exceptional case in which an interpretation, which in all ordinary cases operates reasonably, appears to be unreasonable, that is no reason for saying that that interpretation must be wrong. The Legislature passes Acts to meet ordinary cases which are in its contemplation, and they may, and not unfrequently do, cause hardship in cases which the Legislature has not foreseen.

I therefore agree in thinking that this appeal must be allowed on the ground that the sewer in question was not a sewer made for profit within the meaning of the exception contained in s. 13, sub-s. 1, of the Public Health Act, 1875.

Appeal allowed.

Solicitors for appellants: *Jubb, Booth & Helliwell, Halifax.*
Solicitors for respondents: *Longbottom & Sons, Halifax.*

A. P. P. K.

1899
April 15, 17.

MARNEY *v.* SCOTT.

Negligence—Breach of Duty—Liability of Charterer for Defective Condition of Ship.

The defendant chartered for a single voyage a vessel which was at the time at sea and in ballast. The charterparty declared that she was in every way fit for the service, and provided that she should be so maintained by the owners. On the afternoon of April 5 the vessel was put at the defendant's disposal in dock, and two hours afterwards the loading began, the defendant having contracted with a stevedore for the purpose who had engaged the plaintiff amongst others to carry out the work. Fifteen minutes later the plaintiff, in the course of his work, had to descend a ladder leading into the hold. It came adrift, and the plaintiff fell, sustaining injuries for which he sued the defendant:—

Held, that the defendant was liable to the plaintiff, since it was his duty under the circumstances to make some inspection of the vessel before allowing the stevedore and his men to go on board her, and since the slightest inspection would have revealed the defective state of the ladder.

Further Consideration before Bigham J.

The action was brought to recover an agreed amount as damages sustained by the plaintiff, a stevedore's labourer, in falling down the hold of the ship *Senator*, of which the defendant was the charterer.

The following statement of facts is taken from the judgment of the learned judge: On April 4, 1898, the defendant chartered the *Senator* from the owners, Foley, Aikman & Co., to carry cargo on a voyage from London to Goole. The charterparty contained the usual representation that the vessel was tight, staunch, and strong, and every way fitted for the service; and it provided that the vessel should be so maintained by the owners. It then stated that the vessel was let for the sole use of the charterer (the defendant) for the one voyage, and was to be put at his disposal in the Hermitage Basin, London, and that he was to stow the cargo. The other provisions of the charterparty are immaterial. The *Senator* was at sea on the day when the charterparty was made, and she was not put at the disposal of the defendant in the Hermitage Basin until

early in the afternoon of April 5. The defendant, in anticipation of the arrival of the vessel, had made a contract with a master stevedore named White, by which White undertook to load the cargo at a rate of some shillings per ton. White engaged a number of men, and amongst them the plaintiff, to carry out the work of loading. There was no employment of the plaintiff by the defendant. At about 4 P.M. on the afternoon of April 5, and within about two hours of the time when the vessel was first put at the defendant's disposal, the work of loading began. At 4.15 the plaintiff went on board, and was directed by White to go down into the main hold. In order to get down into the main hold it was necessary to descend a fixed iron ladder reaching from the main hatch down to the bottom of the hold. The plaintiff put his foot on to the top rung of this ladder, when, by reason of its insecure condition, the rung came adrift, and the plaintiff fell into the hold and was seriously hurt.

Cyril Dodd, Q.C. (*Moyses* with him), for the plaintiff. The plaintiff is in the same position with regard to the defendant as if he were White, the stevedore. The action, therefore, arises out of contract. The stevedore contracts with the defendant to load the ship, and the defendant contracts that the ship shall be safe for the stevedore and his men to go upon—that it is in a fit state to be loaded. To adopt the language of Montague Smith J. in *Francis* v. *Cockrell* (1), the defendant promised that the ship was reasonably fit for the use for which the plaintiff entered it, so far as the exercise of reasonable care and skill could make it so. The plaintiff was no mere licensee: he was invited by the defendant to come on board; and therefore it was the defendant's duty to see that he incurred no danger in so doing: see Indian Civil Wrongs Bill, s. 69, in Pollock on Torts, 5th ed. p. 618. In *Indermaur* v. *Dames* (2) Willes J. points out (3) the duty of the occupier of a building with reference to a person resorting thereto in the course of business, and says that such a person "is entitled to the exercise of

(1) (1870) L. R. 5 Q. B. 501, at p. 513. (2) (1866) L. R. 1 C. P. 274.
(3) L. R. 1 C. P. at p. 287.

1899

MARNEY v. SCOTT.

reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows, or ought to know." Here the defendant by the slightest inspection could have ascertained the unsafe condition of the ladder, and he therefore comes within that dictum. *Holmes* v. *North Eastern Ry. Co.* (1) is an even stronger case, and it was there held that the same duty exists towards persons who were little more than bare licensees, as is pointed out by Bramwell B. (2) In the present case the plaintiff was engaged in a transaction of common interest to both parties. The defendant cannot evade his responsibility by saying that he did not know of the defective state of the ladder, or even by employing a competent person to inspect it: *Francis* v. *Cockrell* (3): Pollock on Torts, 5th ed. pp. 477, 478, 482. The cases really come to this: that the occupier of the premises warrants their safety to those whom he invites to enter them for business of common interest, and that he is responsible for everything except a danger which could not be discovered by the exercise of reasonable care. [He also cited *Mowbray* v. *Merryweather* (4); *Caledonian Ry. Co.* v. *Mulholland* (5); *Gwinnell* v. *Eamer* (6); *Heaven* v. *Pender*. (7)]

Rufus Isaacs, Q.C. (*Lennard* with him), for the defendant. There is no question of contract in this case. There was no privity between the plaintiff and the defendant. If the defendant is liable at all, he is liable in tort for a neglect of duty to the plaintiff. What, then, was his duty to the plaintiff? He did not warrant the ship to be free from danger. His only duty was to take reasonable care that no danger should exist. By the terms of the charterparty the ship was fit for the service, and had to be maintained in that state by the owners. It was not the defendant's duty to see that it was so fit, or to keep it in a fit state. The ship had been at his disposal for so short a time that he had no means of knowing of the defective condition of the ladder.

(1) (1869) L. R. 4 Ex. 254; (1871) L. R. 6 Ex. 123.
(2) L. R. 4 Ex. at p. 257.
(3) L. R. 5 Q. B. 501.
(4) [1895] 1 Q. B. 857; 2 Q. B. 640.
(5) [1898] A. C. 216.
(6) (1875) L. R. 10 C. P. 658.
(7) (1883) 11 Q. B. D. 503.

Further, the defendant was not the occupier of the ship in the sense in which that term is used in the cases which have been cited. The occupiers of the ship were the master and crew, who were the servants of the owners, and not of the defendant.

Dodd, Q.C., replied.

Cur. adv. vult.

April 17. BIGHAM J. read the following judgment:—This action was brought by the plaintiff to recover damages for injuries sustained by him in falling down the hold of a ship called the *Senator*. The facts were as follows: [The learned judge then stated the facts as above set out, and continued:—]

I find as a fact that the plaintiff's injuries were due to the unsafe and improper condition of the ladder, and that the plaintiff was not guilty of any contributory negligence. In these circumstances the question arises whether the defendant is liable. In order to establish the liability of the defendant, the plaintiff has to make out a duty or obligation owing by the defendant to the plaintiff, and a breach of that duty or obligation.

It was contended on behalf of the plaintiff that the defendant was liable to the plaintiff in contract. It was said that, although he did not employ the plaintiff to work for him, he nevertheless must be taken to have invited the plaintiff to come on board the vessel to work, and to have impliedly promised that if he did so the vessel and its appurtenances should be in a fit state for the purposes to which they were to be put, and the observations of Montague Smith J. in *Francis* v. *Cockrell* (1) would seem to support that contention.

The defendant, on the other hand, insisted that no question of contract arose; and that the defendant, if responsible at all, was responsible only in tort—that is, for a neglect of a duty. I do not think that the question as to whether the defendant's liability arises out of contract or out of tort is really material, for the measure of that liability would, in my opinion, be the same in either case. What, then, is the measure of the liability? I think that a man who intends that others shall

(1) L. R. 5 Q. B. 501.

1899

MARNEY v. SCOTT.

Bigham J.

come upon property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and the appliances upon it which it is intended shall be used in the work are fit for the purpose to which they are to be put, and he does not discharge this duty by merely contracting with competent people to do the work for him. If the parties with whom he so contracts fail to use reasonable care and damage results, the occupier still remains liable. I think that this is the true effect of the cases which were cited to me in argument. The leading authority is that of *Indermaur* v. *Dames*. (1) In that case Willes J. stated the law to be that a person who goes upon premises upon business which concerns the occupier and upon his invitation, express or implied, is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows, or ought to know.

The same rule of law was acted upon (2) in the case of *Holmes* v. *North Eastern Railway*. (3) Mr. Cyril Dodd suggested that the rule was extended in that case, and that the duty was held to be something greater than the duty to use reasonable care. He suggested that it was there held that the defendant was liable as if he warranted the safety of the premises in all cases except that of a latent danger which was not discoverable by ordinary care. But an examination of the judgments (and I refer particularly to the judgment of Cleasby B. (4)) shews that the same measure of liability was applied as in *Indermaur* v. *Dames*. (1) Moreover, the real point under discussion in that case was whether the plaintiff was a mere licensee, or was in the position of a person invited to go on the premises upon the business of himself and the defendants; the other point, as to the measure of liability, only arose incidentally.

Another case referred to on the part of the plaintiff was that of *Francis* v. *Cockrell*. (5) The head-note of that case is as

(1) L. R. 1 C. P. 274.
(2) L. R. 1 C. P. at p. 288.
(3) L. R. 4 Ex. 254; 6 Ex. 123.
(4) L. R. 4 Ex. at p. 259.
(5) L. R. 5 Q. B. 501.

follows: "A man who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose." Now, if that head-note means that there are two different and independent undertakings, one that due care has been exercised, and the other that the building is in fact reasonably fit, I think it goes beyond the real meaning of the judgments, and it certainly imports one undertaking which, having regard to the absolute character of the second undertaking, is quite unnecessary. But a reference to the judgment of Montague Smith J. shews at once what the meaning of the Court was. He says (1): "I think that there was an implied undertaking on the part of the defendant that due care had been used in the construction" of the stand. "It seems to me that in cases of this kind, which relate to things and not to personal services, the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and the proper mode of stating it is—the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form—that the building was reasonably fit for the use for which it was let *so far as the exercise of reasonable care and skill could make it so.*" Reference was also made to the case of *Caledonian Ry. Co.* v. *Mulholland.* (2) I have carefully read it, and, in my opinion, it has no bearing on the question now under consideration: the deceased man in that case had not been invited by the defendants to use the defective wagon which caused his death, nor was he using it in connection with any work or business of the Caledonian Railway Company.

My attention was called to many other authorities, including, of course, that of *Heaven* v. *Pender* (3); but none of them, in my opinion, enlarges the rule as to liability which has been laid down and followed in the cases to which I have specifically referred. The effect of the authorities is correctly and clearly

(1) L. R. 5 Q. B. at p. 513. (2) [1898] A. C. 216.
(3) 11 Q. B. D. 503.

1899

MARNEY v. SCOTT.

Bigham J.

stated in Pollock on Torts, 5th ed. at p. 477: "The duty is founded not on ownership, but on possession—in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Thus, the duty is described as being impersonal rather than personal. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so." And on p. 482: "The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier, or rather controller. It extends to gangways or staging in a dock . . . . to a temporary stand . . . . to carriages travelling on a railway or road . . . . to ships."

The question then arises, how I ought to apply the rule to the facts of the present case. This I think is the real difficulty. The plaintiff says that the ladder was in a grossly defective condition, and that the defendant did nothing to remedy it. On the other hand, the defendant says that he had only been in possession of the ship for an hour or two; that it came into his possession by virtue of a contract by which it was warranted fit for the service, and by which the owners undertook with him so to maintain it; and that therefore it cannot reasonably be said that he ought to have known of the defective state of the ladder; and that if it cannot be said that he ought to have known of the defect, it follows that want of reasonable care cannot be imputed to him for not repairing it. He says, further, that he was not the occupier of the vessel within the meaning of the cases, because the master and crew were the servants of the owners and not of the defendant, and because, as between himself and the shipowner, the latter was bound to repair and keep in repair. Now, I do not think that the mere fact that the defective state of the ladder was patent (as I think it was,

in the sense that a slight examination would have detected it), and that the defendant did nothing to remedy it, is sufficient to fix him with a breach of the duty which in my opinion he undertook. He must have had a reasonable opportunity of ascertaining that a defect existed; the circumstances must have been such that, though he did not know of the condition of the ladder, he ought to have known of it; and if he ought to have known of it, and might either have remedied it or warned the plaintiff of the danger and did neither, and hurt resulted to the plaintiff, then and only then, can that want of reasonable care be imputed to him which will make him liable. Ought he, then, to have known of the condition of the ladder? Here comes in my doubt. I am far from saying and thinking that a man in the position of the defendant is bound, before he allows the work of loading a vessel to begin, to have the vessel surveyed from stem to stern for the purpose of ascertaining that every little appliance that may come into use is in perfect order. Business would be impossible if such a duty were cast upon him, and it would be beyond the scope of reasonable care. But I cannot help thinking that when a vessel comes into a port after a voyage, though it is only a coasting voyage and though the vessel is in ballast, some slight attention ought to be devoted to the condition of the tackle and appliances which the stevedore's labourers are to use in their work in loading that vessel. What the attention ought to be must depend on the circumstances of each particular case. In this case I think the defendant ought to have made some examination of the ladders into the holds. The slightest examination would have shewn him that this ladder was in such a condition as really to make it a trap; and, taking this view, I hold that he was guilty of a breach of the duty which I think the law imposed on him.

As to the point that the defendant was not the occupier of the vessel within the meaning of the authorities, I think there is nothing in it. The vessel had been placed at the defendant's disposal, and was in his occupation for the purpose of being loaded by him, and it was by his invitation that the plaintiff came on board. This I think made him for the purposes of

1899

MARNEY v. SCOTT.

this case the occupier. For these reasons I give judgment for the plaintiff with costs for the agreed amount of the damages.

Judgment for plaintiff.

Solicitors for plaintiff: *Lovett & Liddle.*
Solicitors for defendant: *Downing, Bolan & Co.*

A. P. P. K.

1899

April 24, 25.

JARMAN *v.* HALE AND ANOTHER.

Limitations, Statute of—Realty—Tenancy at Will—Determination—Mortgage—Creation of Fresh Tenancy—The Real Property Limitation Act, 1833 (*3 & 4 Will.* 4, *c.* 27), *ss.* 2, 7.

A tenancy at will is determined by a legal mortgage of the premises by the owner, and knowledge of the mortgage by the tenant at will.

After the mortgage a new tenancy at will may be created between the parties so as to cause the Statute of Limitations, 3 & 4 Will. 4, c. 27, to begin to run.

APPEAL from the decision of the judge of the Swindon County Court.

The action was to recover possession of a house in Swindon.

The defence was that the plaintiff's claim was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, as amended by 37 & 38 Vict. c. 57.

The following facts were proved or admitted at the trial.

In 1882 the plaintiff became owner in fee of the house in question. In 1883 he allowed the defendants to occupy the house, and they have continued so to do ever since. No lease, agreement, or conveyance between the plaintiff and the defendants was at any time executed, and no rent was ever paid for the house by the defendants. In 1893 the plaintiff mortgaged the house by a legal mortgage to secure a sum advanced to him by the mortgagee, and the defendants, in 1894, had knowledge of this mortgage. There was evidence that after 1894 the defendants had filled up an income tax paper in which they described the plaintiff as being the owner of the house, and themselves as being the occupiers, and that in conversation with other

persons they had made admissions that they were then tenants at will to the plaintiff.

In October, 1898, the plaintiff served notice to quit the house on the defendants, and on their refusing to give up possession this action was brought in November, 1898.

The county court judge was of opinion that the original tenancy at will was determined by the mortgage, and notice of it to the defendants, but that he could not find that a fresh tenancy at will had been created because the plaintiff, having parted with his reversion, had no power to create such a tenancy. He, therefore, thought that the Statute of Limitations (1) began to run against the plaintiff from 1884, and accordingly gave judgment for the defendants.

The plaintiff appealed.

Foa, for the appellant. The defendants' tenancy at will to the plaintiff was determined by the mortgage of 1893, and notice of it to them, and there was evidence upon which the county court judge ought to have found that a new tenancy at will had been subsequently created between the parties. The statute, therefore, did not begin to run against the plaintiff until after a year from the creation of the new tenancy. Any alienation of the reversion by the lessor, of which the tenant at will has notice, is a determination of the tenancy at will:

(1) 3 & 4 Will. 4, c. 27, s. 2: "No person shall . . . . bring an action to recover any land . . . . but within twenty years next after the time at which the right . . . . to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right . . . . to bring such action shall have first accrued to the person making or bringing the same."

Sect. 7: "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to . . . . bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time the tenancy shall be deemed to have determined. . . . ."

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, the period of twenty years within which actions for the recovery of land must be brought under s. 2 of 3 & 4 Will. 4, c. 27, is reduced to twelve years.

1899

JARMAN v. HALE.

Doe v. *Thomas*. (1) Sect. 25, sub-s. 5, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), which enables a mortgagor entitled to possession to sue for possession where the mortgagee has given no notice of his intention to take possession, does not alter the law with respect to the effect of a mortgage and notice of it in determining a tenancy at will. The creation of a fresh tenancy at will may be presumed from admissions by the tenant of the kind proved in this case: *Turner* v. *Doe*. (2) The county court judge was wrong in thinking that as between the plaintiff and the defendants a fresh tenancy at will could not be created after the mortgage. A mortgagor could always grant leases which were good as between himself and his lessee. The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), did not affect that power. Sect. 18, which does not apply to tenancies at will, only enables a mortgagor in possession to make certain specified leases, which shall be good as against incumbrancers, and a mortgagee in possession to make the same leases, which shall be good as against the mortgagor. [He also referred to *Day* v. *Day* (3) and *Tarn* v. *Turner*. (4)]

W. A. Jolly, for the respondents. The statute began to run against the plaintiff in 1883. Since the passing of the Judicature Act, 1873, a mortgage, and notice of it to the tenant at will, does not determine the tenancy. Sect. 25, sub-s. 5, enables a mortgagor entitled to possession to sue for possession where the mortgagee has given no notice that he intends to take possession. Until that notice is given the personal relation between the mortgagor and the tenant at will continues; and, so long as it does continue, the rule that an alienation of the reversion puts an end to the tenancy at will does not apply, because that rule depends upon the personal relation being no longer in existence. Further, apart from the effect of the Judicature Act, 1873, the personal relation between the mortgagor and the tenant at will continues after the mortgage. In order to determine the tenancy there must be evidence of some act by the lessor which, but for the tenancy being a tenancy at will, would be a trespass, as there was in *Turner* v. *Doe*. (2) In *Locke* v.

(1) (1851) 6 Ex. 854.
(2) (1842) 9 M. & W. 643.
(3) (1871) L. R. 3 P. C. 751.
(4) (1888) 39 Ch. D. 456.

Matthews (1), Erle C.J. said (2): "In ordinary cases an estate at will is effectually put an end to by a clear expression of the determination of the will; but this statute (3 & 4 Will. 4, c. 27) requires some more decided act on the part of the owner of the land to prevent the acquisition of a title by one who remains in possession." The creation of a fresh tenancy ought not to be presumed here. The evidence which is relied on as shewing it is consistent with the continuance of the original tenancy at will. In the judgment of the Privy Council in *Day* v. *Day* (3) it is pointed out (4) that to constitute a new tenancy at will there must be an effective entry by the owner, and that, in order to constitute that new tenancy the terminus a quo the statute begins to run, "the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will." Here there was no entry by the owner, nor any agreement between the parties for a new tenancy, nor knowledge by the defendants that the former tenancy had been determined, nor any intention by them to create a fresh tenancy at will. [He also referred to *Doe* v. *Carter*. (5)]

Foa, in reply. The passage cited from the judgment in *Day* v. *Day* (3) is merely obiter; it is in conflict with the decision in *Turner* v. *Doe* (6), and ought not to be followed.

DARLING J. This appeal must be allowed. The question is whether, in consequence of certain transactions between the plaintiff and the defendants, the Statute of Limitations has run or not against the plaintiff. It is said, and I agree, that the tenancy at will has been put an end to because the plaintiff parted with the reversion of the property by mortgaging it, and the defendants had notice of the mortgage. If that be so, it may be—I do not say it would be—that a fresh tenancy at will was created to prevent the statute running. I do not think that it is certain that a fresh tenancy was created,

(1) (1863) 13 C. B. (N.S.) 753.
(2) 13 C. B. (N.S.) at p. 761.
(3) L. R. 3 P. C. 751.
(4) L. R. 3 P. C. at pp. 762, 763.
(5) (1847) 9 Q. B. 863.
(6) 9 M. & W. 643.

1899

JARMAN v. HALE.

Darling J.

because of certain expressions in the judgment of the Privy Council in *Day* v. *Day* (1), which are these: "Doubtless an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a jury that the parties actually made such an agreement. . . . . Besides, as stated by Sir William Erle C.J. in *Locke* v. *Matthews* (2), 'if the owner enters effectively, and creates a new tenancy at will, he has twenty-one years from that period before he can forfeit his estate.' The language and policy of the statute require that to constitute this new terminus a quo, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will." It is said here that the parties did agree for a fresh tenancy at will, because, after the former tenancy had been put an end to, the defendant made certain statements, and asked to have the income tax paper filled up in a certain way. His statement, however, was not, "I have lately put an end to the tenancy and have become tenant at will again to the plaintiff," but "I have occupied the premises rent-free for fifteen years." The county court judge must arrive at a conclusion on the questions whether a new tenancy between the parties was created.

It appears to me that the county court judge was wrong in coming to the conclusion that he could not find that a new tenancy at will was created between the mortgagor and the defendants, because, as he says, that would not have been a legal tenancy as against the mortgagee. But that is not necessary. It is enough if there is a good tenancy between the mortgagor and the person who is in possession of the premises. The matter is not affected either by the Conveyancing Act, 1881, or the Judicature Act, 1873. The words used by the county court judge are: "Had the original tenancy at will in this case been determined by any act which left the reversion in the plaintiff, so that he could have entered into an agreement with the defendant for a fresh tenancy at will, I could have presumed from the signing by him of the income tax paper that a fresh tenancy at will had been created; but, as

(1) L. R. 3 P. C. 751, at pp. 762, 763. (2) 13 C. B. (N.S.) 753.

1899

JARMAN v. HALE.

Darling J.

the plaintiff had no power to create such tenancy, I cannot presume that he did what he had no power to do." In those words the judge goes wrong. The plaintiff had power to create a tenancy perfectly good as against himself.

I think the case must go back in order that the county court judge may find whether a fresh tenancy at will was, or was not, created.

CHANNELL J. I am of the same opinion. This case was dealt with by the county court judge quite properly, with the single exception of the question as to the creation of a new tenancy at will. It was argued for the defendants that the original tenancy had not been determined. I think that both authority and principle are against that view. I think that the principle, and the result of the authorities, are correctly summed up in a passage in Darby and Bosanquet on the Statutes of Limitation, 2nd ed. p. 342. It is: "A tenancy at will is determined by either party alienating his interest; provided, and as soon as, such alienation comes to the knowledge of the other." I think that proposition is quite clear on principle and authority. Here the county court judge has found that the mortgage was known to the defendants. A mortgage is an alienation. This was a legal mortgage, and was in fact an alienation of the plaintiff's interest. The only point then is, was there, or was there not, a new tenancy created? It is quite clear that there was ample evidence upon which the county court judge could find there was a new tenancy. I do not think it necessary to express a definite opinion as to whether the passage which has been cited from the judgment in *Day* v. *Day* (1) was mere obiter dictum, and inconsistent with the other case cited. I am not clear myself that the passage is well founded. It seems to me that, if you find a definite acknowledgment from the tenant that he is holding by permission of the other, that is all you want.

As I have said, there was ample evidence upon which the judge might find that there was a new tenancy at will. But I do not know whether he did find it. Though there is

(1) L. R. 3 P. C. 751.

1899

JARMAN v. HALE.

Darling J.

evidence, it is not clear enough to decide the matter. I agree with my brother Darling that the Conveyancing Act has nothing to do with the matter. It is not a disabling, but an enabling Act. The matter stands the same as if that Act had never been passed.

I therefore think that the judge gave a wrong reason for not finding that a new tenancy at will had been created, and that the case must go back.

Appeal allowed. New trial ordered.

Solicitors for appellant: *Goodale & Hobson, for Townsend, Jones & Wood, Swindon.*

Solicitor for respondents: *A. E. Withey, Swindon.*

W. A.

1899

May 3.

MATHER *v.* LAWRENCE.

Education Acts—Employment of Child by Parent "for purposes of gain"—Elementary Education Act, 1876 (39 & 40 *Vict. c.* 79), *s.* 47.

By s. 6 of the Elementary Education Act, 1876, a person who takes into his employment a child, between the ages of ten and fourteen, who is not exempted from school attendance, is liable to a penalty.

By s. 47, "a parent of a child who employs such child in any labour exercised by way of trade or for the purposes of gain shall be deemed for the purposes of this Act to take such child into his employment."

The respondent, in order to enable his wife to go out and earn money, kept his daughter, a child of the age of thirteen who was not exempted from school attendance, at home to do the housework:—

Held, that he did not thereby employ the child for the purposes of gain so as to render himself liable to the penalty imposed by s. 6.

CASE stated by justices for the county of London.

An information was laid by the appellant, a divisional superintendent of the school board for London, against the respondent, charging that he unlawfully took into his employment one Edith Lawrence contrary to the provisions of s. 6 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79). At the hearing the following facts were proved or admitted:

1899

MATHER v. LAWRENCE.

The said Edith Lawrence was the daughter of the respondent, and was between the ages of thirteen and fourteen years. The respondent was a workman. His work at times was very slack, and at such times he only earned 2*s.* a day. His wife at times went out to work, and for such work received an average wage of 10*s.* a week, and in order to enable her to do so he kept Edith at home during the whole of the day, from November 7 to December 16, 1898, and during such time Edith was occupied under his directions in doing the housework and preparing the meals for the family. Edith Lawrence had not obtained any certificate within s. 5, sub-s. 2, of the Elementary Education Act, 1876, nor did she come within the exemptions contained in the said sub-section, or in s. 9 of the said Act. If the said Edith had been sent to school during the time that she was so occupied the respondent's wife would not have been able to earn any money by going out to work. It was contended that inasmuch as the respondent made use of Edith's services at home for the purpose of enabling his wife to earn money, he came within s. 47 of the said Act, which provides that "A parent of a child who employs such child in any labour exercised by way of trade or for the purposes of gain, shall be deemed for the purposes of this Act to take such child into his employment," and was therefore guilty of the offence charged. The justices were of opinion that the respondent did not employ Edith Lawrence in any labour exercised by way of trade or for the purposes of gain within the meaning of s. 47, and they accordingly dismissed the information, subject to a case for the opinion of the Court.

Marchant, for the appellant. The child was employed for purposes of gain, not the less because the gain was indirect. But for the employment of the child at home the mother could not have earned the money. The case is clearly within the mischief aimed at by the Act, for the effect is to keep the child away from school.

[CHANNELL J. Was not the respondent's real offence that of neglecting to provide the child with elementary education under s. 11 ?]

1899

MATHER v. LAWRENCE.

No doubt he might have been charged under that section; but the maximum fine that the justices can impose for its breach is so small that it would pay the parent to incur its penalties.

No counsel appeared for the respondent.

DARLING J. In this case the justices have found that the respondent kept the child at home to do the housework in order that the wife might go out and earn money, and that if she had not been so kept at home the wife would not have been able to earn the money which she did. Under those circumstances the respondent was charged under s. 6 with unlawfully taking the child into his employment, the child not having obtained a certificate of education, nor coming within the other exemptions specified in s. 5. Sect. 6 was primarily intended to deal with the ordinary case of employment of a child for gain by a stranger. Then, in order to prevent a parent who employed his child for the purpose of earning money from escaping the penalties of that section merely because he was the parent, s. 47 was introduced, which enacts that "a parent of a child who employs such child in any labour exercised by way of trade or for the purposes of gain, shall be deemed for the purposes of this Act to take such child into his employment." I think that what was struck at by that section was the direct earning of gain for the employer, which was not the case here. It is true that the result of keeping the child at home was that someone else was set free to be employed for purposes of gain; but that is a different thing from the child itself being employed for purposes of gain. It is to be observed that the respondent might have been subjected to the penalty imposed by the Act for neglecting to send the child to school. It is said that that penalty is inadequate. If it is, it is for the Legislature to alter the law, and not for us. The appeal must be dismissed.

CHANNELL J. I am of the same opinion. I think that s. 47 was expressly framed to exclude the ordinary case of domestic

employment of children. The real offence of the father here is neglecting to procure the child's attendance at school.

1899

MATHER v. LAWRENCE.

Appeal dismissed.

Solicitor for appellant: *Mortimer.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1899

March 11.

LOWTH *v.* IBBOTSON.

Employer and Workman — Compensation — Personal Injury by Accident — Employment "about" a Factory — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A carter, in the employment of the owners of a factory, was injured while unloading goods from a cart of his employers at a distance of a mile and a half from the factory. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge, before whom the claim came, held that the employment was not "about" a factory within the meaning of s. 7, sub-s. 1, of the Act:—

Held, that, while employment "about" a factory included employment in close proximity to a factory, the county court judge had rightly found as a fact that employment at the distance of a mile and a half was not employment "about" a factory within the meaning of the Act.

Powell v. *Brown*, [1899] 1 Q. B. 157, followed.

APPEAL from the decision of the judge of the Sheffield County Court upon a point of law arising under the Workmen's Compensation Act, 1897.

The appellant, who was a carter in the employment of the respondents, applied under the Act for compensation for personal injury sustained by him. The facts admitted and proved at the hearing were that, on October 13, 1898, the appellant sustained personal injury in the course of his employment as carter for the respondents, who were millers at Sheffield. The accident happened a mile and a half from the respondents' factory whilst the appellant was delivering sacks of flour taken from respondents' factory on their dray; after delivering fourteen sacks, a sack of flour fell on him and threw him into the road, dislocating his shoulder. The learned county court

C. A. 1899

LOWTH v. IBBOTSON.

judge held that the employment was not in, on, or about a factory at the time of the accident within the meaning of s. 7, sub-s. 1, of the Act, and adjudged that the appellant was not entitled to compensation.

Arthur Sims, for the appellant. The appellant was at the time of the accident employed "about" a factory within the meaning of s. 7, sub-s. 1, of the Act. To ascertain the meaning of "about," regard must be had, not merely to the locality of the employment, but also to its nature and character; it cannot be narrowed down to mere location, but must include anything relating to the business of a factory. The class of workmen to be included in s. 7 is that class which is employed in the ordinary business of the factory, whether at the time of the accident the injured workman may have been within or without the four walls of the building. The judgment of Collins L.J. in *Powell* v. *Brown* (1) is an authority for the proposition that the meaning of "about" is not confined to mere physical proximity.

Ruegg, Q.C., and *Arthur Powell*, for the respondents, were not called upon.

A. L. SMITH L.J. This is in my judgment a plain case, and the appeal is hopeless. The Act of 1897 has certain limitations imposed upon its operation. It confers an enormous benefit on the employee at the expense of the master; and in saying this I am fully aware that the statute was a very proper one to be enacted, nor do I in the least dissent from its policy. But it is not every employee or every master who comes within its purview, and this is one of the cases which is outside the scope of the Act. Reading s. 7, sub-s. 1, we see that the Act is to apply *only* to employment on, in, or about one of certain localities—in the present case, a factory; was then the appellant employed on, in, or about a factory at the time of the accident? The material fact in the case is that he was a mile and a half away. That certainly is not "on or in" a factory; can it be said to be "about" it? In *Powell* v. *Brown* (1), with regard

(1) Ante, p. 157.

to the word "about" I said: "In my view that word means that the employment may be in close propinquity to the factory, and whether that was so in any particular case is a question of fact to be determined by the tribunal before which the claim comes." I adhere to what I then said, and I think I was right. Here the county court judge has found as a fact that a mile and a half away is not "about" a factory, and we cannot interfere with that finding. I think, too, that his finding was right.

COLLINS L.J. I am of the same opinion.

ROMER L.J. I agree.

Solicitors for appellant: *Hulse, Trustram & Co., for A. Muir Wilson, Sheffield.*

Solicitors for respondent: *Hurd & Sons, for A. Neal, Sheffield.*

W. J. B.

[IN THE COURT OF APPEAL.]

SIMMONS AND ANOTHER *v.* WHITE BROTHERS.

Employer and Workman—Compensation—"Dependants"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

By s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, the word "dependants" means "in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death":—

Held, that, in order to bring himself within the Act as a dependant, an applicant for compensation must shew that he was to some extent dependent upon the earnings of the deceased workman for the ordinary necessaries of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings. Whether an applicant is in that sense a dependant is a question of fact in each particular case.

Appeal from a decision of the judge of the Dartford County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

C. A. 1899

SIMMONS v. WHITE BROTHERS.

The respondents were the father and mother of the workman, a lad of fourteen years of age, who had been killed while shunting trucks upon the premises of the appellants, his employers; their application for compensation was based upon the ground that they were in part dependent upon the earnings of the deceased within the meaning of s. 7, sub-s. 2, of the Act. The deceased had been in the employment of the appellants for about five weeks, during which time his wages averaged seventeen shillings a week; the father was also in the appellants' employment and earned full wages. The father said in his evidence: "The deceased brought his wages home; we took them the same as other parents, and gave him what we thought right for pocket-money. His wages helped to maintain my wife and family. I anticipated deriving benefit from his wages in the future." The learned county court judge found as a fact that there was a common fund into which the deceased's wages were paid for helping to support the family; he was of opinion that present pecuniary benefit or the anticipation of future pecuniary benefit was sufficient to constitute the applicants in part dependent on the earnings of the deceased, and found on the facts that they were in part dependent within the meaning of the Act.

The employers appealed.

S. H. Leonard, for the appellants. There was no evidence to warrant the finding of the county court judge, who misdirected himself as to the interpretation of the word "dependent" as used in the Act. The word must bear its ordinary meaning, as it has not been made the subject of statutory interpretation. The mere fact of deriving present pecuniary benefit or anticipating future pecuniary benefit from another does not constitute the person benefited "dependent" upon him; he must rely on the other person for some of the necessaries of life. Dependence involves the idea of support by the person upon whom dependence is placed: see Murray's Dictionary, tit. dependant. [He also cited Minton-Senhouse and Emery on Accidents to Workmen, p. 156.]

Hawtin, for the respondents, was not called upon.

A. L. SMITH L.J. The sole question for us is whether there is any point of law involved in this case, for, if not, no appeal will lie. We can only allow this appeal if we are satisfied that there was no evidence to support the finding of the learned county court judge, and I cannot say that there was no such evidence. The point taken as to misdirection comes to the same thing; if there was any evidence on which the county court judge could find as he did, he did not misdirect himself, and his finding is conclusive. Is there then any such evidence? The deceased was a boy of fourteen, who had been at this work for five weeks before the accident; the evidence shews that his father was a workman living with his wife, and that the deceased lived with them; he brought his wages home weekly, and they formed part of a common fund; the father said that he gave him a portion of his wages for pocket-money, and that the rest helped to maintain his wife and family. I cannot say that there was no evidence on which the county court judge could find as he did; he has found that the respondents were in part dependent on the deceased; this finding brings the case within s. 7, sub-s. 2, of the Act, and we cannot disturb it.

COLLINS L.J. I am of the same opinion. I think there is no satisfactory evidence that the learned county court judge misdirected himself. There seem to be very good materials for a satisfactory direction in the following passage from Minton-Senhouse and Emery on Accidents to Workmen, at p. 156: "It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact by the arbitrator." It has not been proved that this

C. A. 1899

SIMMONS v. WHITE BROTHERS.

COLLINS L.J.

passage was actually before the county court judge, but no doubt it was in substance before him; this, however, does not create a presumption of misdirection, and I should presume that the view of the authors was adopted by him. If there was no misdirection, the question is reduced to one of pure fact, upon which of course no appeal will lie.

ROMER L.J. I agree. I do not see how we can escape from the conclusion that this was a decision of the learned county court judge on a question of fact, although I have a strong suspicion that I might myself have found differently. As a question of principle is to some extent involved in the present case, I desire to say that I agree with the passage in Minton-Senhouse and Emery on Accidents to Workmen, and that in my judgment a "dependant," in order to get compensation, must be dependent in the proper sense of that term, and that it is not sufficient if he was merely deriving benefit from the earnings of the deceased; he must be to some extent dependent on him for the ordinary necessaries of life, having regard to his class and position in life.

Appeal dismissed.

Solicitors for appellants: *Leonard & Pilditch.*
Solicitor for respondents: *Edward Clarke.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 18.

WOOD *v.* WALSH & SONS.

Employer and Workman—Compensation—Building repaired by means of a Scaffolding—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, the Act is to apply (inter alia) to employment "on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

The outside of a house, more than thirty feet high, was being painted by workmen using ladders for the purpose; one of the men was killed by the breaking of the rung of the ladder on which he was standing. There was a board, one end of which was tied to a rung of one of the ladders, the other end resting on the sill of a window:—

Held, that the house was not being constructed or repaired by means of a scaffolding, and that the Act did not apply.

Painting the outside of a house is not "repair," nor are ladders "scaffolding" within the meaning of the above section.

APPEAL from the decision of the judge of the Leeds County Court upon questions of law arising under the Workmen's Compensation Act, 1897.

The respondent, who was the widow of a man named Wood, had claimed compensation under the Act from the appellants in respect of her husband's death from an accident while in their employment. The application was referred to an arbitrator, who made his award subject to a special case, which was in substance as follows:—

The deceased man was at the time of the accident in the employment of the appellants, and was engaged in painting the outside of a shop in Leeds; he was standing on a ladder, a rung of which broke, causing him to fall to the ground; he died the same day. The building exceeded thirty feet in height; the ladder on which the deceased was standing was about thirty-three feet long and was resting against the wall; the deceased was painting and puttying when the accident happened. Several men were engaged in preparing the building for painting by removing the dirt and blisters, and making good the

C. A. 1899

WOOD v. WALSH & SONS.

woodwork with putty and the stonework with plaster or cement, and afterwards in painting the surface. Nothing was being done to the building except preparation for painting and the actual painting. There were five or six ladders on the whole job and some planks, but there was no evidence that any of the planks, except one, were used for standing upon; the others were placed flat upon the slates and roof. One of the planks was used thus: one end rested loose on the sill of a window of the top floor of the building (which was two storeys high), and the other end rested upon a rung of a ladder and was tied to the ladder; one of the men had been standing on this plank to work, but the deceased had not. Witnesses for the respondent said that in the trade anything was "scaffolding," from a step-ladder upwards.

It was contended for the respondent that the deceased was in the employment of the appellants on a building which exceeded thirty feet in height, and which was being repaired by means of a scaffolding within the meaning of s. 7, sub-s. 1, of the Act. Reliance was placed upon the puttying and making good of the stonework, as well as the painting, as constituting repairs within the meaning of s. 7, sub-s. 1, of the Act; it was also contended that the ladders themselves constituted scaffolding, and that in any event the one plank used in the manner above described was scaffolding, and, further, that it was not necessary that the deceased should actually have been working on the scaffolding.

For the appellants it was contended that repairs and scaffolding within the section referred to some operation of a substantial nature; that the work upon which the deceased man was employed was not repairing within the meaning of the section; that a ladder was not scaffolding within the meaning of the section, and that there was no evidence of the use of scaffolding within the meaning of the section; and, further, that the deceased was not in the employment contemplated by the section unless he was actually working on a scaffolding.

The arbitrator held that ladders merely were not scaffolding within the meaning of the Act; that if a building was being

repaired by means of scaffolding within the meaning of the Act, it was not necessary that the injured workman should be actually working upon the scaffolding if he were employed upon the building; that this building was not being repaired in the manner contemplated by the Act, and that there was no scaffolding within the meaning of the Act. He therefore made his award in favour of the appellants, but stated a case for the opinion of the county court judge under s. 4 of Sched. II. of the Act, raising the following questions of law: (1.) Whether the building was being "repaired" within the meaning of the Act; and (2.) if so, whether it was repaired by means of "scaffolding" within the meaning of the Act. The learned county court judge answered both questions in the affirmative, and reversed the decision of the arbitrator, and made an award in favour of the respondent. The employers appealed.

C. A. Russell, Q.C., and *Clarke Hall*, for the appellants. The decision of the arbitrator was right, and should be restored; at the time of the accident the deceased was not employed upon a building exceeding thirty feet in height which was being repaired by means of a scaffolding within the meaning of s. 7, sub-s. 1, of the Act. Painting a building is not repairing it; the county court judge held otherwise, on the ground that an omission to paint would be a breach of a covenant to repair in a lease; but the cases are not analogous. The mere preparation of the surface before the actual application of the paint would not amount to repair within the ordinary meaning of that word; and s. 7 applies to structural repair of a building, and not to mere decorative work such as cleaning and painting. Secondly, even assuming that painting comes within the meaning of "repair" as used in s. 7, the house was not being repaired by means of a scaffolding. A ladder by itself is not "scaffolding"; nor did the tying of a plank to the rung of the ladder make the combination "scaffolding."

[They cited *Mellor* v. *Tomkinson & Co.* (1); 58 & 59 Vict. c. 37, s. 23, sub-s. 2; Century Dictionary, tit. Scaffolding; Parker's Glossary of Architecture.]

(1) Ante, p. 374.

C. A. 1899

WOOD v. WALSH & SONS.

Robert Wallace, Q.C., and *Horace Marshall*, for the respondent. The decision of the county court judge was right. The painting of this building amounted to "repair" within the meaning of the Act, for before repainting it was necessary to fill up the holes in the plaster and woodwork. Painting a house comes within a covenant to repair, even where there are express covenants with regard to painting. "Repair" means the restoration of a house to a proper state for occupation and for user for the purposes for which it is ordinarily used, and includes such painting as in the present case, although there may be purely decorative painting which would not be included in any interpretation of the term "repair."

Secondly, this building was being repaired by a scaffolding within the meaning of the Act. The word "scaffolding" must be interpreted in its popular sense as meaning any structure outside a building by means of which the building is constructed or repaired; even if a ladder by itself would not be included in the expression, the tying of the plank to the ladder would make a structure that would properly be included. A decision in favour of the appellants would exclude large numbers of workmen whom the Legislature intended to benefit.

[They also referred to 58 & 59 Vict. c. 37, s. 18.]

C. A. Russell, Q.C., was not called upon to reply.

A. L. SMITH L.J. This case comes before us on a point of law arising under the Workmen's Compensation Act, 1897. I have already said with regard to that Act, and I desire to repeat it, that this Court cannot give any effect to the argument that, if a particular claimant is shut out from the benefits of the Act, our decision will come as a surprise to the public; it is patent on the face of the Act itself that all workmen are not within it, but that some are excluded, and we must decide in the present case whether the deceased man, at the time he met with the accident, was within the Act or not. He was engaged in painting the outside of a house, for which purpose ladders were being used by the workmen employed. There was a board which had been tied to a rung of one of the ladders, the other end resting on a window-sill. The deceased did not fall off,

or even use, this board; he stood on a rung of one of the ladders; the rung broke and the man was killed by the fall. Does he come within the purview of this Act? I cannot doubt that the Legislature when it passed the Act knew perfectly well the meaning that would be conveyed by the use of such words as "ladder" and "scaffolding," "painting" and "repairing," and that the words used in s. 7 were deliberately chosen. Looking at the words of that section, there is not much difficulty in construing it for the purpose of deciding the present case. Sub-s. 1 provides that the Act is to apply *only* to "employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished"; the rest of the subsection is immaterial. Now, it is admitted that this building was over thirty feet in height, and, therefore, the first question for our decision is, "Was it being constructed or repaired?" In other words, is painting the outside of a house to be considered as construction or repair within the ordinary meaning of those words? It is certainly not a work of construction; and, speaking for myself, I should certainly think that neither construction nor repair of a house could mean merely outside painting. The arbitrator has found in the present case that nothing was being done to the house but preparation for painting and the actual painting; would any one using language in its ordinary sense call painting the repairing of his house? If the Legislature desired to bring this class of employment, which is a very well-known one, within the purview of the Act, they would have done so in clear and unmistakable terms, instead of using language which, if given its ordinary meaning, operates to exclude it. The words "constructed or repaired" mean some work relating to the structure of the building. On this point, I think that the true construction of the section is that repair does not include painting.

Then, it was further contended that in this case the building was being constructed or repaired "by means of a scaffolding."

C. A. 1899

WOOD v. WALSH & SONS.

A. L. Smith L.J.

Is a ladder "scaffolding"? The question has only to be put in order to be answered, for no man in his senses who wanted his house repaired by means of a ladder would say that he wanted it done by means of scaffolding; if he wanted scaffolding used he would say so. In my judgment, this case does not come within the section at all. It has been contended that the attachment of a plank to a rung of the ladder made it a scaffolding; that, however, is a question of fact, and the arbitrator found that it did not, and I agree with him. I do not propose to attempt to define the meaning of the word "scaffolding," which will probably have to receive frequent interpretation as fresh cases arise. I think, therefore, that the learned county court judge was wrong, and that the arbitrator's decision should be restored.

COLLINS L.J. I am of the same opinion, and agree with all that has fallen from my Lord. At some later period this Court may have to define the word "scaffolding"; but I say nothing as to that to-day.

ROMER L.J. I agree.

Appeal allowed.

Solicitors for appellants: *Lawson, Coppock & Hart, Manchester.*

Solicitor for respondent: *Willey, Leeds.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1899
March 25.

REES *v.* THOMAS.

Employer and Workman—Compensation—Accident arising out of or in Course of Employment—Act done upon Emergency—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

An accident happening to a workman who, while in his master's employment and on his master's work, does upon an emergency an act in the interests of his master outside the scope of what he was employed to do, and suffers injury while doing the act, is within the purview of the Workmen's Compensation Act, 1897.

A fireman employed in a coal-mine was in the course of his duty carrying a report of the state of the mine from the pit's mouth to the office; the horse drawing the tramway truck in which he was riding ran away, and in endeavouring to stop it he fell and was killed:—

Held, that the accident arose out of or in the course of the workman's employment within the meaning of s. 1, sub-s. 1, of the Act.

APPEAL from the decision of the judge of the Bridgend County Court upon a question of law arising under the Workmen's Compensation Act, 1897.

The respondent, the widow of a workman in the employ of the appellants, had applied for compensation in respect of a fatal accident to her husband. The appellants were mine-owners, and the deceased was a fireman in their employ; his duties, which were chiefly in the mine, included the examination of the mine, and reporting upon its condition before the men went down to work; it was also his duty to make his report as to the condition of the mine at an office on the surface about half-a-mile from the pit's mouth. On the morning of the accident he had been down the mine, and was walking in the performance of his duty from the pit's mouth to the office in order to make his report. There was a tram line running in the direction of the office upon which there were at the time some trucks laden with ashes, which were being drawn by a horse under the control of a fellow-workman. A rule of the mine provided that no workman should ride on full trucks on

C. A. 1899

REES v. THOMAS.

the tram line, but the deceased got on one of the trucks to ride towards the office; he had nothing to do in the way of his duties with the carrying of the ashes. While the deceased was riding on the truck the horse bolted; the deceased jumped down, and in running to stop the horse fell and was killed. The county court judge found that the breach of the colliery rules committed by the deceased in riding upon the truck did not amount to serious and wilful misconduct on his part within the meaning of s. 1, sub-s. 2 (*c*), of the Act, and that the accident arose in the course of his employment, and awarded 245*l.* compensation to the widow.

The mine-owners appealed.

Ruegg, Q.C., and *John Sankey*, for the appellants. The accident did not arise out of or in the course of the employment of the deceased within the meaning of s. 1, sub-s. 1, of the Act. It was no part of the duty of the deceased to stop his master's horse; in so doing he was acting as a mere volunteer, although, no doubt, his employment gave him the opportunity of doing it. The case of a servant doing upon an emergency something outside his employment, but in his master's interest, was reserved by this Court in *Lowe* v. *Pearson* (1); but in such a case the duty of the servant to his employer, if any, is a moral, and not a legal, one; a breach of such a duty would not entitle the master to dismiss the servant, and its mere performance would not be an act done in the course of the employment within the meaning of the Act.

[They also cited *Smith* v. *Lancashire and Yorkshire Railway* (2); *McNicholas* v. *Dawson* (3); *Engelhart* v. *Farrant & Co.* (4)]

Cripps, Q.C., and *W. D. Benson*, for the respondent, were not called upon.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed. The material facts are very short. The deceased

(1) Ante, p. 261.
(2) Ante, p. 141.
(3) Ante, p. 773.
(4) [1897] 1 Q. B. 240.

man was a miner, and on the day of the accident he was in the course of his employment taking a report from the pit to the office. There was a tram running in the direction in which he was going, and he got on to it; he had, it is true, no business to be upon it, but the county court judge held, and in my opinion rightly held, that the deceased had not been guilty of serious and wilful misconduct within the meaning of the Act; that part of the case may, therefore, be dismissed from consideration. What happened was this: the horse ran away; the deceased endeavoured to stop it, and in doing so was killed. Did this accident which happened to him arise out of and in the course of his employment? I cannot entertain the slightest doubt that the answer to this question must be in the affirmative. It is said that it did not arise out of his employment, because it was the result of a voluntary act on his part, that is, of his attempt to stop the horse. But the deceased was acting in the interest of his master in an emergency which suddenly arose, and in which any one would, I should think, have tried to do the same thing. I think, therefore, that the accident arose out of his employment; and there is no doubt that it arose in the course of it, as he was taking the report to the office in the ordinary course of his duty. This question of emergency was touched upon by us in the recent case of *Lowe* v. *Pearson*. (1) In that case the boy who was injured was not acting in the course of his employment; he was employed in manual labour, and was forbidden to clean the machine at which he was working; but during lunch-time, and in the absence of the proper person who superintended the machine, he took upon himself the cleaning of it, with which he had nothing whatever to do. In my judgment in that case I said, "It is not the case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master. I reserve the question what our decision in such a case ought to be till it arises." I adhere to what I there said. In my opinion the present case falls within the words of the Act; and this appeal should be dismissed.

(1) Ante, p. 261.

C. A. 1899

REES v. THOMAS.

COLLINS L.J. I am of the same opinion, and have nothing to add.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Bell, Brodrick & Gray, for J. T. Hughes, Bridgend.*

Solicitors for respondent: *Riddell, Vaizey & Co., for Walter Morgan, Bruce & Co., Pontypridd.*

W. J. B.

C. A. 1899 *March* 18, 25.

[IN THE COURT OF APPEAL.]

HODDINOTT *v.* NEWTON, CHAMBERS & CO.

Employer and Workman—Compensation—Personal Injury to Workman—Height of Building—Construction or Repair—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A building, which measured twenty-eight feet in height from the ground to the parapet and thirty-six feet to the ridge of the roof, was erected as stables for an omnibus company. Six months after its completion and after the commencement of its use as stables the company employed a firm of ironmasters to strengthen the building by introducing iron stays which were fastened to the girders and the upright iron columns supporting the building. A workman in the employ of the ironmasters, while standing inside the building at a height of eight feet from the ground upon a structure composed of scaffold boards resting on ledgers secured to the iron columns and supported in the middle by trestles, fell while lifting one of the iron stays and received injuries which proved fatal:—

Held, that the building was a building exceeding thirty feet in height within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897; that for the purposes of that section it was immaterial whether the scaffolding was inside or outside the building; but that the building was not being "constructed or repaired," and that therefore the employment was not "an employment on, in or about a building which exceeds thirty feet in height and is either being constructed or repaired by means of a scaffolding," within the meaning of that section.

APPEAL from a decision of the judge of the Wandsworth County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The application was made by the present respondent, the widow of a workman who died from the consequences of an accident which happened to him while in the employment of the appellants. An action had originally been brought by her to recover damages under the Employer's Liability Act, 1880, which terminated in favour of the employers, and compensation was then assessed at the same hearing under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897. The facts were shortly as follows:—

Some time previous to the accident a stable had been built by a firm of builders for the London General Omnibus Company; the building was twenty-eight feet high from the ground up to the top of the parapet of the walls (which regulates the height of buildings under the London Building Act, 1894), and thirty-six feet up to the ridge of the roof, and it had been occupied by the omnibus company and used for the stabling of horses for some six months. The company's engineer was of opinion that in order to prevent vibration and possible danger to the building it was desirable to strengthen it by means of iron stays connecting the iron girders with the upright iron columns of the building, and the appellants, a firm of ironmasters, were employed to put in the strengthening stays and girders required. The deceased man was employed by the appellants upon the work, and at the time of the accident he was inside the stable standing upon a structure put up for use in the daytime and removed every evening when the horses came into the stable: no poles were used in its construction, but the workmen stood upon scaffold boards resting on ledgers, which were themselves lashed to the iron columns; in order to make the structure stronger trestles were placed underneath the middle of the scaffold boards and supported them; the board upon which the deceased stood was about eight feet from the ground. While in the act of lifting a stay, the deceased lost his balance and fell from the scaffold board; the stay fell on him, and he died from the injuries received.

The county court judge held that the building was over thirty feet in height, and that it was being constructed or repaired by means of scaffolding, and awarded compensation,

C. A. 1899

HODDINOTT v. NEWTON, CHAMBERS & Co.

the amount of which was not disputed, to the respondent. The contractors appealed.

Bray, Q.C., and *G. Spencer Bower*, for the appellants. The county court judge was wrong. First, the building did not exceed thirty feet in height: it was only twenty-eight feet to the top of the parapet, which regulates the height under the London Building Act, 1894, and should be adopted as the test under the Workmen's Compensation Act, 1897. Secondly, a building, in order to be within this provision of the Act, must be a building which is being repaired at a height exceeding thirty feet from the ground; the test of danger is the being thirty feet above the ground, and the height of the scaffolding must have some relation to the height of the building. Thirdly, being inside a completed building the structure could not be a scaffolding, which applies to something outside. Fourthly, the work going on was not construction or repair within the meaning of the Act; the building had been finished six months before, and it was therefore not being constructed; neither was it being repaired, for it was not in want of repair; what was being done was in the nature of an alteration or addition, and was not within the Act. The structure employed was not a scaffolding at all.

Ruegg, Q.C., and *Moyses*, for the respondent. The proper measurement of the building is to the ridge of the roof, and it exceeded thirty feet in height. The county court judge properly held that the building was being constructed or repaired within the meaning of the Act. The stays were necessary to finish the construction of the building, which had not been completed by the original builder. The operation that was being carried on, although in a sense a structural alteration, is not thereby precluded from being treated as an act of repair. The building was not merely being constructed or repaired: it was being constructed or repaired by means of a scaffolding. The structure was a scaffolding, a word which is used in the Act in a colloquial and popular sense, and it was none the less scaffolding because it was erected inside the building. The employment need not be upon a scaffolding thirty feet high,

though there must be a scaffolding (whatever its height) which is being used upon a building of that height. The height of the building, not of the scaffolding, is the test that must be applied in order to see whether a case comes within this part of the section.

A. L. SMITH L.J. In this case the widow of the deceased originally sued under the Employer's Liability Act, but at the trial it was held that the case did not fall within that Act, and an application was then made for compensation under the Workmen's Compensation Act—a claim which is very different in its nature. The first point for our consideration arises in this way. The London General Omnibus Company had had a building erected for stables for their horses; was the height of this building to be measured from the ground to the top of the upright walls or to the top of the roof? It is not necessary to say whether the height of the building below the ground level can be taken into consideration, for in this case the building was admittedly more than thirty feet high from the ground up to the ridge of the roof, to which point, I think, the measurement should be taken; the respondent has, therefore, made out, I think, that the employment was on a building over thirty feet high.

The second question is whether this building was being constructed or repaired by means of a scaffolding. I cannot say that there was no evidence that the structure used was a scaffolding, and the county court judge found that it was one. The men certainly used scaffold boards in its construction; there were no poles, but the ledgers were lashed to the upright iron columns of the building, and, to strengthen the structure, trestles were placed underneath it in the middle. If this was not in itself a scaffolding it cannot be made one by the fact that it was used for the purpose of a scaffolding; but, as I said before, I cannot hold that there was no evidence to support the finding that it was a scaffolding. Speaking for myself, it makes no difference whether the scaffolding is inside or outside a building. Nor do I think that the scaffolding must be over thirty feet high; I do not think that the language of the section can be twisted into

C. A. 1899

HODDINOTT v. NEWTON, CHAMBERS & CO.

A. L. Smith L.J.

that meaning without doing violence to its ordinary meaning. We are asked to say that the words "any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding," mean that not only the building, but also the scaffolding, must be over thirty feet in height; but I do not find that in the section, and I think that the scaffolding need not be thirty feet high.

Then comes the next question: Was the deceased employed by the undertakers upon a building which was being constructed or repaired? The word "undertakers" is defined later on in the section as meaning, in the case of a building, "the persons undertaking the construction, repair or demolition." Now, what are the facts in the present case? These stables had been completed and were in actual use, and it was found that something not contemplated in the original design was necessary for the proper carrying on of the business of the omnibus company, and stiffening stays were introduced into the building, going from girder to girder. Were the ironfounders who put in these stays constructing the building? That cannot be, for it had already been constructed, and what was then done was only an addition to that which it had originally been contemplated would be wanted. How can it be said that the deceased was employed in a building which was being constructed? The construction was at an end, but some strengthening was afterwards needed to be done. I cannot say that the appellants, the ironmasters, were at the time of the accident employed on a building which was being constructed; the work done by them was done after the construction. If we call what was done an "alteration," it does not affect the question; for although that word is used in s. 7, sub-s. 2, in the definition of "engineering work," which includes "construction or alteration or repair," in the case of a building only construction, repair, and demolition are mentioned, and "alteration" is altogether omitted. It may be that this work was alteration, but alteration is not provided for by the section. If it is an addition, then it does not come under the head of "repair." But can it be repair? The question seems to admit of a very simple answer by merely putting the cross-

question, "Was anything out of repair, and was it necessary to repair anything?" It is clear that no part of the building was out of repair, and that the work done by the appellants was not in the nature of repair, but was the providing of something additional to stiffen an already completed building. I think, therefore, that the deceased was not employed on, in, or about a building which was being constructed or repaired. That is really an end of the case, and the appeal should be allowed.

COLLINS L.J. I am of the same opinion. We must look at the provisions of s. 7 as a whole in order to see what the Legislature meant. We find in that part of it which deals with the matter in hand that the employment must be "by the undertakers as hereinafter defined on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." All these conditions are laid down in the section, and we must look at them all in determining the question which we have to consider. The scaffolding must, in my judgment, have some relation to the height of the building; the word "scaffolding" must be interpreted by reference to the nature of the work for which the Legislature contemplated that it was to be used; that is to say, in the construction or repair of a building exceeding thirty feet in height by an undertaker who is defined to be the person undertaking *the* construction, repair, or demolition. This definition throws some light upon the question what sort of operation the Legislature was contemplating. It is the construction, repair, or demolition of a building, which would, primâ facie, suggest the building as a whole, and the operation to which scaffolding is contemplated as an essential would seem therefore to be primâ facie the work of constructing or repairing such a building as a whole—an operation to which, not a scaffold, but scaffolding, is essential.

It is not necessary, and it would be impossible, to define what the exact legal meaning is of scaffolding as used in this connection, nor is it necessary to decide whether something short of construction or repair of a building over thirty feet high as a whole carried out by means of a scaffolding in the

C. A. 1899

HODDINOTT v. NEWTON, CHAMBERS & CO.

Collins L.J.

full sense of the term, such as might be used for dealing with a building over thirty feet high, might not be within the Act. But though definition is difficult or impossible, it is possible to say as to certain cases that they fall within or without the Act. It seems to me that the present case cannot be brought within the Act without straining the particular words at the expense of the general intention. It is impossible to suppose that the Legislature fixed thirty feet as an arbitrary line having no relation to the actual risk provided against, so that when a building had once reached thirty feet high any operation which could be called construction or repair of any part of the building inside or out, however near the ground, where the workman had to stand on an arrangement which might be termed scaffolding in order to reach it, would be within the Act and give him a remedy if he fell. Such an interpretation would give no reasonable ground for the introduction of thirty feet at all. It never could have been meant to cover the case of a man employed to put up a rod to hang pictures on in a drawing-room, though he supported himself on a platform which could be called a scaffolding in order to do it. It is obvious that the height of the house could have no bearing whatever on the risk of such an operation. It might be said that that would not be repair, but no more is the case before us; the same observation would apply to the case of white-washing a ceiling, and the Legislature never intended to include in the Act operations of that kind; the scaffolding must be used in connection with a building thirty feet high. I agree that the danger to a person working below is as great as to one working at the top, and that the height at which the man is working is not the proper test; the danger contemplated is that incidental to dealing with a building more than thirty feet high by means of scaffolding adequate to such a building. The question must be one of fact for the jury in each particular case. In my opinion this case is not within any view which can fairly be taken of the intention of the Legislature.

ROMER L.J. I am of the same opinion. The question arises as to work in the nature of building or repair which is being done to buildings over thirty feet high by means of a

scaffolding. I agree with the view of my Lord that the building was thirty feet high, and that it is not necessary that scaffolding should be outside the building. It is not necessary, nor indeed is it desirable, to attempt to define the word "scaffolding," nor to say whether in this case the structure used was a scaffolding or not, for it is, in my opinion, clear that the building on which the workman was employed was not "a building exceeding thirty feet in height which was being constructed or repaired by means of a scaffolding" within the meaning of s. 7, sub-s. 1. It would be dangerous to attempt to define with exactness the meaning of the words used in that sub-section; but in construing the language as to the height of the building, regard must be had to the words "construction," "repair," and "scaffolding"; they should not be considered separately, but together, for they have a mutual bearing and effect upon each other. I also think that the appellants did not undertake the construction or repair of the building in question; what they did was not a work of construction or repair, but was an alteration in, or addition to, a building already constructed and not in need of repair properly so called.

Appeal allowed.

Solicitors for appellants: *Ingle, Holmes & Sons.*
Solicitor for respondent: *C. F. Appleton.*

W. J. B.

C. A.
1899
May 3.

[IN THE COURT OF APPEAL.]

NORTH EASTERN RAILWAY COMPANY, APPELLANTS *v.* OVERSEERS OF THE POOR OF THE PARISH OF DALTON AND ASSESSMENT COMMITTEE OF THE THIRSK UNION, RESPONDENTS.

Highway—Rate—Exemption—Liability to Repair Ratione Tenuræ—Sum Paid in Discharge of Liability—Highway Act, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33—*Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 25, 29.

In a hamlet forming part of a township all the highways were repairable by the occupiers of lands ratione tenuræ, and highway rates were not leviable by reason of the exemption in the Highway Act, 1835, s. 33. A railway company occupied lands in the hamlet, and, prior to the aftermentioned order, were liable ratione tenuræ to repair a portion of a highway therein. An order was made by justices under the Highway Act, 1862, s. 35, by which it was declared that all the highways in the hamlet should be parish highways, and be repaired by the highway board of the district in which the hamlet was situated, and the sums to be paid by the respective occupiers of lands previously liable ratione tenuræ for the repair of the highways in discharge of their liability were fixed. These sums were duly paid. The company were subsequently rated in respect of their lands in the hamlet for expenses incurred in the repair of highways within the district including those in the hamlet:—

Held (reversing the judgment of Wills and Kennedy JJ.), that the order made by justices as above mentioned did not operate to deprive the railway company of their previously existing exemption from highway rates, and that the company were therefore exempt from payment of so much of the rate as was levied in respect of the repair of highways in the hamlet.

Held, also, that the exemption was not destroyed by the Local Government Act, 1894.

APPEAL from the judgment of a Divisional Court (Wills and Kennedy JJ.) upon a case stated by the quarter sessions for the North Riding of Yorkshire, upon the hearing of an appeal by the North Eastern Railway Company against a rate made for the relief of the poor in the parish of Dalton, and for other purposes chargeable thereon. (1)

Prior to the making of an order by the quarter sessions for

(1) [1898] 2 Q. B. 66.

the North Riding of Yorkshire, at Michaelmas 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing that parish to the Birdforth highway district, the hamlet formed part of the township of Bagby, and was a place in which all the highways were repairable by the occupiers of lands ratione tenuræ, and in which no highway rates were leviable by reason of the exemption contained in s. 33 of the Highway Act, 1835. (1) The hamlet continued to form part of the township of Bagby until June 1, 1886, as hereinafter mentioned.

The North Eastern Railway was prior to the making of the said order, and has since been, and still is, in occupation of lands in the hamlet, and was, prior to the making of the order next hereinafter referred to, liable ratione tenuræ to repair eighty-four yards of a certain highway in the hamlet.

On April 11, 1881, an order was made, notwithstanding the opposition of the North Eastern Railway Company, by justices at a petty sessions for the division of Birdforth, under s. 35 of the Highway Act, 1862 (2), whereby it was ordered that all the highways within the hamlet of Islebeck should become, and for ever thereafter be, parish highways, and be repaired and

(1) 5 & 6 Will. 4, c. 50. By s. 33, "When property, or the owner or occupier in respect thereof, has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed."

(2) 25 & 26 Vict. c. 61. By s. 35, "Where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid, to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway."

C. A. 1899

NORTH EASTERN RAILWAY v. DALTON OVERSEERS.

maintained by the Birdforth Highway Board, and whereby the sums to be paid by the respective occupiers of lands within the hamlet previously liable to the repair of the highways, in full discharge of all claims thereafter in respect of the repair and maintenance of the highways, were fixed. Such sums were duly paid in accordance with the order.

By an order of the Local Government Board, dated June 1, 1886, and confirmed by the Local Government Board's Provisional Orders Confirmation (Poor Law) Act, 1887, the hamlet of Islebeck was detached from the township of Bagby, and was amalgamated with the township of Dalton in the Birdforth highway district.

On June 7, 1897, a rate for the relief of the poor in the parish of Dalton, and for other purposes chargeable thereon, was made, in which the railway company was rated and assessed in respect of its occupation of its lands in the hamlet of Islebeck. This rate was levied (inter alia) in respect of expenses incurred, or to be incurred, by the rural district council of Thirsk, which council was the successor of the Birdforth Highway Board, in respect of the repair and maintenance of the highways within the rural district, including the portion of the parish of Dalton which was, or is, comprised in the hamlet of Islebeck.

The railway company entered an appeal against the rate at the Midsummer quarter sessions, which appeal was respited till the following quarter sessions, when it was heard.

On behalf of the company it was contended—

That the company, having been liable to repair the highways in the hamlet of Islebeck ratione tenuræ, was exempted by s. 33 of the Highway Act, 1835, from liability to rates levied in respect of the repair and maintenance of those highways, and had continued to be exempt ever since; and

That the company, having complied with the requirements of the before-mentioned order of petty sessions was, by virtue of s. 35 of the Highway Act, 1862, discharged of all claims thereafter in respect of the repair and maintenance of the highways in the hamlet of Islebeck, and was therefore not liable to pay the rate.

On behalf of the respondents it was contended—

That the exemption from the payment of highway rates conferred by s. 33 of the Highway Act, 1835, continued only so long as the liability of the company to repair the eighty-four yards of the highway ratione tenuræ lasted, and that therefore the exemption determined on April 11, 1881, when by virtue of the order of the justices the said portion of the highway became a parish highway ;

That the order dated April 11, 1881, only operated to discharge the company from all claims from that date by the Birdforth Highway Board or its successors in respect of the repairs and maintenance of the eighty-four yards of the highway then ordered to be made repairable by the parish, and in no way affected the liability of the company in respect of its occupation of property within the district of the Thirsk Rural District Council, and otherwise by law liable to be rated, from paying rates for expenses incurred by the council of the Thirsk rural district in respect of the repair and maintenance of the highways within the rural district.

The court of quarter sessions were of opinion that the railway company was not exempt from payment of any portion of the rate. They accordingly dismissed the appeal.

The question for the opinion of the Court was whether the railway company was exempt from payment of so much of the rate as was levied in respect of the repair and maintenance of the highways in the hamlet? (1)

The Divisional Court held that the company was not so exempt, and affirmed the decision of the quarter sessions.

A. T. Lawrence, Q.C. (*R. Cunningham Glen* and *A. A. Bethune* with him), for the appellants. The proceedings under s. 35 of the Highway Act, 1862, by which the liability of the appellants to repair a portion of a highway in the hamlet ratione tenuræ was put an end to, could not have the effect of destroying the exemption from rates for the repair of highways

(1) It will be observed that the question of estoppel which was discussed and decided in the Divisional Court was not dealt with in the Court of Appeal, and therefore the portion of the case which related to it is omitted.

C. A. 1899

NORTH EASTERN RAILWAY v. DALTON OVERSEERS.

in the hamlet which they had previously enjoyed under s. 33 of the Highway Act, 1835. The effect of s. 35 is that the liability to repair ratione tenuræ is commuted for a capital sum to be fixed as the full equivalent of that liability, which is to cease. It cannot be that such a commutation of the liability to repair ratione tenuræ has the effect of imposing a liability to highway rates which did not previously exist. Sect. 35 does not provide that, in fixing the sum to be paid by the person liable ratione tenuræ, regard shall be had to the fact that he will become liable to highway rates, and it is plain on the language of the section that the sum is to be fixed on the basis of its being a full pecuniary equivalent for his liability ratione tenuræ. That being so, it would be unjust that he should after payment of that sum be liable to rates for the repair of highways in the hamlet. The case of *Reg.* v. *Heath* (1) is an authority to shew that the fact that the charge for repair of highways is now levied as part of the poor-rate does not take away an exemption from liability to highway rates. The decision in *Heath* v. *Weaverham Overseers* (2), which will be relied on by the respondents, really has no application to the present case. In that case the alteration of the highway under a turnpike Act passed in 1782 had destroyed the exemption from highway rates prior to the Highway Act, 1835.

Macmorran, Q.C., and *H. Gawan Taylor*, for the respondents. Sect. 35 of the Highway Act, 1862, does not provide that the sum fixed under it shall be in discharge of anything but the liability "in respect of the repair and maintenance of such highway." The effect of an order under the section is merely to commute the liability ratione tenuræ to repair the particular highway. It is submitted that, upon the ceasing of the ground for the exemption from highway rates, namely, the liability of the occupiers of land in the hamlet to repair their own highways ratione tenuræ, the effect is that the exemption itself ceases: *Heath* v. *Weaverham Overseers*. (2) The judgment in that case does not appear to proceed on the ground suggested by the appellants' counsel. It clearly assumes that an exemption from highway rates under s. 33 of the Highway Act, 1835, the ground

(1) (1866) L. R. 1 Q. B. 218. (2) [1894] 2 Q. B. 108.

of which is the liability to repair a highway ratione tenuræ, will be destroyed, if subsequently to that Act the ground of the exemption ceases. In practice the justices in fixing the sum to be paid under s. 35 of the Highway Act, 1862, in discharge of the obligation to repair ratione tenuræ, rightly or wrongly, do fix it on the basis that the person so discharged will become liable to highway rates, and it was so fixed in the present case.

Secondly, the exemption conferred by s. 33 of the Highway Act, 1835, cannot, having regard to the existing state of the law, have any application. There is no longer any rate for the repair of highways "hereby (i.e., by the Highway Act, 1835) imposed." The area over which the charge for the repair of highways is levied and the incidence of the charge have been altogether changed. By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), provision was made for the transfer of the powers and functions of highway boards to rural sanitary authorities, and for charging the expenses of the highways in the district upon the district fund instead of the respective parishes in the district severally: see s. 5 of the Act; and now by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25, sub-s. 1, all the powers, duties, and liabilities of the rural sanitary authority and of any highway authority in the district of a rural district council are transferred to the council, and the rural district council are to be the successors of the rural sanitary authority and highway authority; and by s. 29 the expenses of a council for a rural district are to be defrayed in the manner directed by the Public Health Act, 1875, with regard to expenses incurred in the execution of that Act by a rural sanitary authority, and the provisions of the Public Health Acts with respect to those expenses are to apply accordingly. Highway expenses are therefore now leviable in a rural district in the manner provided by the Public Health Act, 1875, with regard to the expenses of rural sanitary authorities. Under that Act the authority issues its precepts for contribution to the overseers of the various parishes included in the entire district, and they pay the amount of the precept out of the poor-rates for their

C. A. 1899

NORTH EASTERN RAILWAY v. DALTON OVERSEERS.

respective parishes. The charge so imposed cannot be said to be a rate imposed under the Highway Act, 1835. It is levied over a wholly different area, namely, the whole district, in respect of the highway expenses for the whole district. There are now two sorts of highways: highways the cost of repairing which falls on the parish; and main roads the cost of which falls on the county. If the contention for the appellants is correct, it involves that in making the county rate provision must be made for preserving exemptions such as that contended for in the present case. That cannot have been intended by the Legislature.

A. T. Lawrence, Q.C., was not called upon to reply.

A. L. SMITH L.J. This is an appeal from the judgment of a Divisional Court consisting of my brothers Wills and Kennedy upon a case stated by quarter sessions. The question raised has reference to a rate in respect of certain highway expenses, which has been imposed by the respondents, the overseers of the parish of Dalton, upon the appellants, the North Eastern Railway Company, and against which the company appeal, on the ground that they are exempt from liability to such a rate. It appears from the case that the railway company were the occupiers of land, and as such liable ratione tenuræ to repair eighty-four yards of a certain highway, in a hamlet, in which all the highways were repairable by the occupiers of lands ratione tenuræ, and in which no highway rates were leviable by reason of the exemption contained in s. 33 of the Highway Act, 1835. It is contended for the respondents that the exemption from liability to highway rates which the company formerly enjoyed has been taken away by the operation of statutes subsequent to the Highway Act, 1835, dealing with the subject of highways. In order to determine whether that is so, it is necessary to examine the provisions of the Highway Act, 1835, and the other statutes to which reference has been made. By s. 27 of the Highway Act, 1835, power is given to the surveyor of highways for the purposes of the Act to levy a rate upon all property liable to be rated and assessed to the relief of the poor; and by s. 33, which, with all submission

to my brother Wills, he appears to me to have passed over, it is provided that, "When property, or the owner or occupier in respect thereof, has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed." The effect of these provisions clearly is that all property assessable to poor-rates is to be assessable to highway rates with the exception that, where any property was before the passing of the Act exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, that property shall be exempt from the payment of the rate imposed by the Act. If the matter stood there, it would be clear that the railway company were exempt from liability to be rated for the repair of highways in the hamlet in respect of the land occupied by them therein. But it is argued that by virtue of the provisions of s. 35 of the Highway Act, 1862, the company's exemption has ceased. Before proceeding to that section I will refer to s. 62 of the Highway Act, 1835. That section provides, in substance, that, where any person is liable to repair a highway ratione tenuræ or otherwise, justices may make an order that the highway shall become a parish highway and, if they do so, shall fix the proportion of the expenses of repairing it to be annually paid by the person so liable to the surveyor of highways, or, instead of so doing, may fix a certain sum to be paid by the person so liable to the surveyor "in full discharge of all claims thereafter in respect of the repairs of such highway." The meaning of that provision appears to me clearly to be that, when a sum is so fixed and paid by a person in commutation of his liability to repair ratione tenuræ, it is in full discharge of all liability. Then, by s. 35 of the Highway Act, 1862, it is provided that "Where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person or corporation so liable"—and now by 27 & 28 Vict. c. 101, s. 24, the highway authority—"may apply to any justice of the peace for

C. A. 1899

NORTH EASTERN RAILWAY v. DALTON OVERSEERS.

A. L. Smith L.J.

the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid, to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district in full discharge of all claims thereafter in respect of the repair and maintenance of such highway." It is argued that, though a person so liable to repair a highway was previously exempt from highway rates in the place in question, and has paid a sum under the section in full discharge of his liability ratione tenuræ, yet, upon the true construction of the section, the result is that a liability to pay highway rates from which he was previously exempt is imposed upon him. I cannot so construe the section. I think that it means just what it says, namely, that, where the justices have in accordance with its provisions fixed the sum to be paid by the person liable ratione tenuræ, and that sum has been paid, the payment of that sum is in full discharge of all claims thereafter in respect of the repair and maintenance of such highway, and no liability is imposed by the section on the person who has paid that sum to the payment of highway rates from which he was before exempt. The case of *Reg.* v. *Heath* (1), with which the judgment of the Divisional Court does not appear to have dealt, appears to me to be an authority in favour of the view which I am expressing.

Another point was taken before us which was not taken in the Divisional Court. It was argued that, by reason of the provisions of the Local Government Act, 1894, there is no such thing now as a highway rate imposed by the Act of 1835. The best answer to that argument may be given in the language of

(1) L. R. 1 Q. B. 218.

the special case which speaks of the rate as levied, inter alia, in respect of expenses incurred, or to be incurred, by the rural district council of Thirsk, "which council was the 'successor' of the Birdforth Highway Board, in respect of the repair and maintenance of the highways within the rural district."

The foundation of the power to levy rates for highway purposes is the Highway Act, 1835, and it is by virtue of their being the successors of the previously existing highway authority that the rural district council are able to impose the charge for repairs of the highways upon the parishes in their district. It is true that alterations have been made with regard to the area over which the charge is imposed, and the persons on whom it is incident, and the machinery for levying it, but in my judgment for the present purpose it must still be regarded as being imposed by virtue of the Highway Act, 1835. For these reasons I think that the appeal must be allowed.

VAUGHAN WILLIAMS L.J. I agree. I do not know that there is much to be gained by adding to what has been already said by my brother A. L. Smith, but I should like to say a few words out of sincere respect for the judges who decided this case in the Divisional Court in order to shew that I appreciate the argument which forms the basis of their judgment. Wills J. begins his judgment really by dealing with the words at the end of s. 35 of the Highway Act, 1862, which provide that the justices "shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway"; and, as I understand him, he says that, the discharge mentioned being only a discharge from the liability to repair the highway ratione tenuræ, there is nothing in those words which can operate as a discharge from the liability to pay highway rates. He then goes back to the earlier words of the section which empower the justices to make an order that the highway shall be repaired and maintained by the parish in which the same is situate, and says that the meaning is that it shall become liable to be repaired by a rate to be levied on all the occupiers of land in the parish,

C. A. 1899

NORTH EASTERN RAILWAY v. DALTON OVERSEERS.

Vaughan Williams L.J.

including the individual who has been discharged from the liability to repair ratione tenuræ. Upon this view of the section clearly the basis upon which the justices ought to fix the capital sum to be paid by the person liable to repair the highway ratione tenuræ must be by estimating, not the sum which would represent in money the total amount of his liability present and future in respect of the highway ratione tenuræ, but merely the difference between the sum which would represent the cost of performing his previous obligation himself to repair the highway and the sum which would represent the amount of his liability as a ratepayer. It seems to me, however, that this view altogether gives the go-by to the provisions of s. 33 of the Highway Act, 1835, which expressly exempts from liability to highway rates under that Act persons in the position of the railway company, whose property was previously exempt from liability to highway rates because it was situated in a place which repaired its own roads, all the highways therein being repairable by the occupiers of lands ratione tenuræ. The judgment of the Divisional Court appears not only to give no effect to the exemption created by that section, but also not to deal with the judgment of the Court of Queen's Bench delivered by Lush J. in *Reg.* v. *Heath* (1), a portion of which is to my mind strong to shew that that exemption still continues in force in favour of persons in the position of the railway company. On the other point raised I agree with what my brother A. L. Smith has said.

ROMER L.J. I agree. Where s. 35 of the Highway Act, 1862, is put in force, and a sum is fixed under that section to be paid by the person previously liable to repair the highway ratione tenuræ in discharge of his liability, I think that, upon the true construction of the section, that sum ought to be calculated upon the footing of its being a full equivalent in money to the previously existing liability of the person liable ratione tenuræ, and not upon the footing that he will in future be liable to the payment of highway rates from which he had previously been exempt. I cannot gather from the words of

(1) L. R. 1 Q. B. 218.

the section any intention that the sum to be paid should be fixed upon the latter footing. If that be the correct view of the section, it would be an extraordinary result that a person, who has paid a sum which is the full equivalent of his previous liability ratione tenuræ, should, in addition to that sum, incur a fresh liability to highway rates. I do not think that could have been the intention of the Act, and there are certainly no words in it expressive of any such intention. It appears to me that the case of *Heath* v. *Weaverham Overseers* (1) is distinguishable, and that the observations of the judges in that case, upon which reliance was placed by the counsel for the respondents, must be taken as directed to the special circumstances of the case. If, as suggested, they are intended to go beyond that case, and to apply to a case like the present, in so far as they do so, I must respectfully differ from them.

Appeal allowed.

Solicitor for appellants: *A. Kaye Butterworth.*

Solicitors for respondents: *Robbins, Billing & Co., for Swarbreck & Rhodes, Thirsk.*

(1) [1894] 2 Q. B. 108.

E. L.

END OF VOL. I.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 2, 1899, will be as follows :—

In the First Series,
[1899] 1 Ch. [1899] 2 Ch.

In the Second Series,
[1899] 1 Q. B. [1899] 2 Q. B. [1899] P.

In the Third Series,
[1899] A. C.

INDEX.

ACCIDENT—Policy of insurance against accident —Stamp duty—Employer's liability—Workmen's compensation - - 353
See REVENUE. 8.

—— Workmen's compensation.
See Cases under EMPLOYER AND WORKMAN.

ACT OF BANKRUPTCY - 566, 612, 626, 710
See BANKRUPTCY. 1—4.

ACTION—Right of—Person induced by misrepresentation to commit crime—False representation - - - - 816
See FOREIGN ENLISTMENT.

ADJUSTMENT—Liabilities—Transfer of part of one county to another county - 515
See LOCAL GOVERNMENT. 5.

—— Liabilities—Transfer of part of one union to another union - - - 540
See LOCAL GOVERNMENT. 6.

ADMINISTRATION—Estate of deceased debtor Execution not completed by sale—Rights of execution creditor - 699
See BANKRUPTCY. 5.

ADULTERATION—*Milk—Liability of innocent Vendor for Milk Adulterated in Transit—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

The respondent, a milk salesman, contracted to supply pure milk to an association. The milk was to be delivered to the association at a railway terminus in London. The respondent delivered the milk in a pure and unadulterated condition to the servants of the railway company at his local station, and the milk was adulterated without his knowledge or consent during the transit from the local station to the terminus :—

Held, that the respondent was liable to be convicted under s. 6 of the Sale of Food and Drugs Act, 1875. PARKER *v.* ALDER **Div. Ct. 20**

ADVANCE FREIGHT—Charterparty - 193
See SHIP. 2.

ADVANCES—Wages—Seamen - 727, 735
See SHIP. 4, 6.

AFTER-ACQUIRED PROPERTY—Undischarged bankrupt—Solicitor's bill of costs—Assignee for value—Notice by trustee—Priority - - - - 688
See BANKRUPTCY. 10.

AGENT—Independent contractor—Liability of principal for negligence of—Collateral negligence - - - - 221
See PRINCIPAL AND AGENT. 2.

—— Patent agents—Registration—Validity of rules—Saving of rights acquired 406
See PATENT. 1.

—— Surreptitious dealing with other principal—Bribe accepted by agent—Avoidance of contract - - - - 369
See PRINCIPAL AND AGENT. 1.

AGREEMENT—As to compensation—Agricultural holdings — Tenant giving up possession before expiration of term 465
See LANDLORD AND TENANT. 1.

—— Hire of chattel in consideration of yearly payment—Stamp - - - 250
See REVENUE. 3.

—— Stamp duty — Covenant — Agreement to execute mortgage - - - 361
See REVENUE. 7.

AGRICULTURAL HOLDINGS—Compensation
See LANDLORD AND TENANT. 1, 2.
465, 559

AGRICULTURAL RATES — Contribution for special purpose—County rate basis—Apportionment - - - 759
See LOCAL GOVERNMENT. 3.

AGRICULTURAL RATES ACT, 1896, ORDERS, Art. XVII. - - - - - 759
See LOCAL GOVERNMENT. 3.

ALDERMAN—Outgoing—Resignation of office—Office when vacant - - 386
See MUNICIPAL CORPORATION. 3.

AMENDMENT—Registration of voters—Power to amend - - - 95, 102
See PARLIAMENT. 1, 2.

APPEAL—Condition precedent to appeal—Question of law raised at trial—Request to make a note - - - 501
See COUNTY COURT. 1.

—— Costs—Security for—Workmen's Compensation Act, 1897 - - - 593
See PRACTICE. 8.

—— Costs of official liquidator—Order to pay costs personally—Winding up of Company - - - - - 961
See COMPANY. 2.

—— Criminal cause or matter—Application to enforce general district rate—Jurisdiction - - - - - 273
See PRACTICE. 2.

—— From order of judge at chambers—Prohibition to judge of county court 54
See PRACTICE. 3.

—— Poor-rate—Distress warrant - - 532
See POOR-RATE. 1.

—— Revising barrister—Borough vote—Duplicate entries—Notice of selection - 109
See PARLIAMENT. 4.

APPOINTMENT—Assistant overseer—Right to rate-books - - - - 396
See LOCAL GOVERNMENT. 1.

APPORTIONMENT — Rates — Contribution for special purpose—County rate basis 759
See LOCAL GOVERNMENT. 3.

ARBITRATION—Agricultural holdings—Award to landlord of amount in excess of tenant's claim—Enforcement of award
See LANDLORD AND TENANT. 2 559

—— Minerals—Notice of intention to work—Compensation — Duty of company to take up award - - - 921
See RAILWAY. 3.

ASSESSMENT—Public-house—Rateable value—Evidence of advantageous situation and business done - - - 667
See POOR-RATE. 2.

ASSIGNEE—For value—Undischarged bankrupt—After-acquired property — Solicitor's bill of costs—Notice by trustee—Priority
See BANKRUPTCY. 10. 688

ASSIGNMENT—Leaseholds—Stamp duty—Consideration—Rent - - - 335
See REVENUE. 5.

—— To one-man company—Fraudulent conveyance—Act of bankruptcy - - 612
See BANKRUPTCY. 3.

—— Wages—Advances—Seamen - - 735
See SHIP. 6.

ASSISTANT OVERSEER—Right to rate-books—Appointment - - - 396
See LOCAL GOVERNMENT. 1.

ASSIZES—Notice of trial—Summons for directions—Jurisdiction - - - 266
See PRACTICE. 5.

AVOIDANCE OF CONTRACT—Agent—Surreptitious dealing with other principal—Bribe accepted by agent - - 369
See PRINCIPAL AND AGENT. 1.

AWARD — Agricultural holdings — Award to landlord of amount in excess of tenant's claim—Enforcement of award - 559
See LANDLORD AND TENANT. 2.

BAILEE — Interpleader — Estoppel — Right to set up jus tertii - - - 546
See PRACTICE. 4.

BAILMENT—*Gratuitous Loan of Chattel—Defect in Article Lent—Knowledge of Lender—Injury to Borrower resulting from Defect—Liability of Lender.*

The duty of a gratuitous lender of a chattel, for use by the borrower, is to communicate defects in the article lent, with reference to the use to which it is to be put, of which he is aware, and if, wilfully or by gross negligence, he does not discharge this duty, he is liable for injury resulting to the borrower from such defects.

Blakemore v. *Bristol and Exeter Railway*, (1858) 8 E. & B. 1035, and *MacCarthy* v. *Young*, (1861) 6 H. & N. 329,a pproved. COUGHLIN *v.* GILLISON - - - - C. A. 145

BANKRUPTCY—*Act of Bankruptcy—Bankruptcy Notice—Married Woman trading separately from Husband in Firm Name—Action against Firm—Receiving Order — Rules of Supreme Court, Order* XLVIII. *a, rr.* 5, 8, 11.

A receiving order cannot be made against a married woman trading separately from her husband under a firm name on the ground of non-compliance with a bankruptcy notice founded upon a judgment obtained against her in the firm name. *In re* FRANCES HANDFORD & Co. *Ex parte* FRANCES HANDFORD - C. A. 566

2. —— *Act of Bankruptcy—Execution—Seizure of Goods and Possession of Sheriff for Twenty-one Days—Sheriff's Fees—Possession Money—Continued Possession at Request of Debtor—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11.

The sheriff levied execution on the goods of a debtor and remained in possession for fifteen months. This was done at the request of the debtor and with the consent of the execution creditor. At the end of the fifteen months a receiving order was made against the debtor on his own petition, and the goods were sold. On the taxation of the costs of the execution, the Board of Trade disputed the right of the sheriff to possession money for the full period:—

Held, that the act of bankruptcy created by s. 1 of the Bankruptcy Act, 1890, consisted of—first, the seizure by the sheriff; and, secondly, his remaining in possession for twenty-one days; and that his subsequent continuing in possession under the same seizure did not constitute a further or continuing act of bankruptcy; that consequently there was no act of bankruptcy under this section available against the debtor; and that the sheriff was entitled under s. 11 to possession money for the full period as costs of the execution.

In re Hurley, (1893) 10 Morr. 120, approved and followed. *In re* BEESTON - C. A. 626

BANKRUPTCY—*continued.*

3. —— *Act of Bankruptcy—Fraudulent Conveyance—Assignment to one-man Company*—13 *Eliz. c.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*b*); *ss.* 43 *and* 44.

A trader, who was liable under a judgment for the costs of an action, purported to sell his business to a company which he had formed for the purpose in consideration of fully paid-up shares and of the company undertaking to pay his debts. He was the chairman, managing director, and secretary of the company; he or his nominee held substantially the whole of the shares in it, and he had the complete control of it, including the power to draw cheques, which he exercised in his own favour. Within three months of this transaction a bankruptcy petition was presented against him, grounded on his non-compliance with a bankruptcy notice in respect of the costs in question, and a receiving order was made upon it. His liabilities exceeded 2000*l.*, with assets nil. Between the presentation of the petition and the making of the order, a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed. Upon a motion by the trustee in bankruptcy against the liquidator impeaching the validity of the transfer of the business:—

Held, that the transfer was fraudulent and an act of bankruptcy; that the title of the trustee to the business related back to the date of the transfer, and overrode the claims of the creditors of the company in the winding-up; and that the liquidator was bound to hand over to the trustee the assets representing the business at the time of the transfer.

Decision of Wright J. reversed. *In re* CARL HIRTH. *Ex parte* THE TRUSTEE - **C. A. 612**

4. —— *Contract for Sale of Lease—Deposit—Act of Bankruptcy by Vendor before Completion—Action to Recover Deposit—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

On a contract for the sale of the lease of a public-house a day was fixed for completion, and the plaintiff, the purchaser, paid a deposit to the defendants as stakeholders. It was a term of the contract that the deposit should be forfeited in case the purchaser refused to perform his part of the agreement. Before the date fixed for completion the vendor committed an act of bankruptcy, which came to the notice of the purchaser, who thereupon refused to complete, and demanded the return of the deposit:—

Held, that though the contract for sale was protected by s. 49 of the Bankruptcy Act, 1883, the assignment and the payment of the purchase-money, in pursuance of the contract but after notice of the act of bankruptcy, would not have been protected, and that the purchaser was therefore not bound to complete, and was entitled to recover the deposit. POWELL *v.* MARSHALL, PARKES & CO. - - - - **C. A. 710**

5. —— *Execution Creditor—Rights of—Administration of Estate of Deceased Debtor—Execution not completed by Sale—Rights of Execution Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.

An order for the administration of the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of s. 45 of that Act, so as to disentitle an execution creditor of the deceased debtor to retain, as against the trustee of the debtor's estate, the benefit of an execution not completed before the date of the administration order.

Judgment of Wright J., [1898] 2 Q. B. 28, affirmed. HASLUCK *v.* CLARK - **C. A. 699**

6. —— *Proof — Corporation—Dissolution — Claim of Dissolved Corporation—Right of the Crown—Bona Vacantia.*

A trading firm became bankrupt in 1847, and a corporation created by statute proved in the bankruptcy, with other creditors. In 1887 the corporation was dissolved by an order of the Court under the Companies Acts. Afterwards it was discovered that the bankrupts had been entitled to certain railway shares, and the official receiver recovered the value of the shares, and held the proceeds as trustee in the bankruptcy. Another creditor moved to expunge the proof of the dissolved corporation, claiming that the money to which the corporation had been entitled as a creditor, and which was then in the hands of the official receiver as trustee, was divisible among the still existing creditors.

The county court judge made an order expunging the proof.

On appeal by the Attorney-General on behalf of the Treasury:—

Held, reversing the order, that on the dissolution of the corporation the proceeds of the shares in the hands of the official receiver as trustee in the bankruptcy had passed to the Crown as bona vacantia, and the Crown was entitled to the amount. *In re* HIGGINSON & DEAN. *Ex parte* ATTORNEY-GENERAL - - **Div. Ct. 325**

7. —— *Proof—Loan to Firm on Terms of Sharing Profits—Subsequent Advances without express Stipulation as to Rate of Interest—Dissolution of Firm—Subsequent Agreement with continuing Partner to continue Loan at Fixed Rate of Interest—Postponement—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 2, 3.

In 1893 A., B., and C. executed a deed by which A. and B. entered into partnership for a term of years, and C. agreed to lend them 1600*l.* as capital for the business, she to receive a share of the profits in lieu of interest. In June, 1895, A. and B. by deed, to which C. was a party, dissolved partnership, B. continuing the business and taking over and becoming solely responsible for the debt due to C., which at this date comprised the 1600*l.* and a further sum advanced by her without any express stipulation as to interest. In August, 1895, B. and C. entered into a deed by which it was agreed that C. should continue to receive a share of profits in lieu of interest in respect of the 1600*l.*, but that the further advance and any future advances should carry a fixed rate of interest. In 1896 B. became bankrupt, and C. claimed to prove in competition with the other creditors of the business in respect of all her advances:—

Held, that C. must be postponed in respect of all her advances prior to August, 1895. *In re* MASON. *Ex parte* BING - **Wright J. 810**

BANKRUPTCY—*continued.*

8. —— *Receiving Order—Sheriff—Execution—Sale—Poundage—Sheriffs Act*, 1887 (50 & 51 *Vict. c.* 55)—*Order as to Fees of August* 31, 1888—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 1.

A sheriff's officer is not entitled to poundage where, after he has seized goods in execution under a fi. fa., a receiving order is made against the judgment debtor and the goods are delivered to the official receiver or trustee in bankruptcy in pursuance of s. 11, sub-s. 1, of the Bankruptcy Act, 1890.

Judgment of the Queen's Bench Division, [1899] 1 Q. B. 66, affirmed. *In re* THOMAS. *Ex parte* SHERIFF OF MIDDLESEX - - C. A. 460

9. —— *Retainer—Insolvent Testator—Administration Order—Debt due to Executor—Assets paid to Official Receiver without retaining Debt—Mistake — Repayment — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 4, 5, 9.

The mere fact of payment by an executor to the official receiver of assets collected by the executor does not necessarily bar the executor's right of retainer, any more than payment into court.

Where, therefore, the usual order was made under s. 125 of the Bankruptcy Act, 1883, for administration of the estate of an insolvent testator, and the executrix, who was a creditor of the estate, in ignorance of her right of retainer, paid to the official receiver all the assets she had collected, and then set up her right of retainer, it was *held* that she was entitled to be repaid her debt in full out of the assets in the hands of the official receiver. *In re* RHOADES. *Ex parte* RHOADES - - - - Wright J. 905

10. —— *Undischarged Bankrupt — After-acquired Property—Solicitor's Bill of Costs—Chose in Action—Assignee for Value—Notice by Trustee—Priority—Out of Pocket Expenses.*

An undischarged bankrupt assigned for value the amount of his taxed bill of costs as solicitor for the petitioning creditors of a company in liquidation. His trustee in bankruptcy gave notice, before the assignee, to the liquidator of the company claiming the amount of the taxed bill as part of the after-acquired property of the bankrupt:—

Held, that the trustee was entitled to the amount in priority to the assignee.

Mercer v. *Vans Colina*, (1897) 67 L. J. (Q.B.) 424, followed.

In such a case the bankrupt's out of pocket expenses will, if properly vouched, be allowed to him out of the amount. *In re* BEALL. *Ex parte* THE OFFICIAL RECEIVER - Wright J. 688

—— Judgment debtor—Charging order on dividend—Costs—Property recovered 863
See SOLICITOR.

BANKRUPTCY ORDER AS TO FEES, August 31, 1888 - - - - - 460
See BANKRUPTCY. 8.

BETTING—Defined place where betting carried on - - - - - 892
See GAMING.

BETTING—*continued.*

—— Private ground used for—"Place of public resort"—By-laws—Validity - 425
See MUNICIPAL CORPORATION. 1.

BICYCLE — Passengers' luggage — "Ordinary luggage" - - - - 243
See RAILWAY. 4.

BILL OF LADING—Exemption of shipowner from liability—"Defects latent on beginning voyage or otherwise" - 56
See SHIP. 1.

—— Transfer to sub-vendee—Possession of document of title—Consent of seller—Stoppage in transitu - - - 643
See SALE OF GOODS. 2.

BONA VACANTIA—Right of the Crown—Proof—Corporation—Dissolution - 325
See BANKRUPTCY. 6.

BOND—*Condition not to Commit Breach of Injunction—Enumeration of Prohibited Acts—Condition depending on one Event — Liquidated Damages—Rules of Supreme Court, Order XIV., r.* 1.

A bond was executed by the defendant for the payment of 100*l.* to the plaintiff. The condition of the bond was that if the defendant should at all times thereafter, in obedience to a perpetual injunction granted by the High Court of Justice, refrain from trespassing on the plaintiff's lands therein mentioned, or the walls, gates, or fences thereof, or inclosing the same, and from pulling down or removing or otherwise injuring the same, or inciting others to commit any such trespasses, the obligation should be void. The defendant committed a breach of the injunction:—

Held, that the condition of the bond depended on one event only, namely, a breach of the injunction, and that the sum secured by the bond was a liquidated sum, to the recovery of which the procedure of Order XIV., r. 1, was applicable. STRICKLAND *v.* WILLIAMS - - C. A. 382

BOOK—Assistant overseer—Right to rate-books.
See LOCAL GOVERNMENT. 1. 396

BOROUGH VOTE—Registration of voters.
See Cases under PARLIAMENT.

BREACH OF COVENANT — Forgetfulness by tenant — Equitable relief against forfeiture - - - - 835
See LANDLORD AND TENANT. 4.

BREACH OF DUTY—Liability of charterer for defective condition of ship - 986
See NEGLIGENCE.

BRIBERY—Agent—Surreptitious dealing with other principal — Bribe accepted by agent—Avoidance of contract - 369
See PRINCIPAL AND AGENT. 1.

BUILDINGS—"Approved" plan—Power to dispense with observance of by-laws 444
See LOCAL GOVERNMENT. 2.

—— Dangerous structures—Disturbance of pavement—Duty to restore pavement after hoarding removed - - - 720
See LONDON. 1.

BUILDINGS—*continued.*

—— Exceeding thirty feet in height—Personal injury by accident—Workmen's Compensation Act - - - 70
See EMPLOYER AND WORKMAN. 1.

—— "Scaffolding"—Workmen's compensation 1009, 1018
See EMPLOYER AND WORKMAN. 9, 13.

BURGLARY—Loss by theft—Entry by opening unlocked shop door—"Actual forcible and violent entry" - - 595
See INSURANCE, BURGLARY.

BY-LAWS—Power to dispense with observance of—Buildings—"Approved" plan 444
See LOCAL GOVERNMENT. 2.

—— Validity—Private ground used for betting—"Place of public resort" - 425
See MUNICIPAL CORPORATION. 1.

CANDIDATE—Nomination of disqualified person—Election—Right to petition - 852
See MUNICIPAL CORPORATION. 2.

CARRIAGE — Contract—Delay — Owner's risk note—Construction - - 309
See RAILWAY. 1.

CASE STATED—On behalf of one person only—Prisoners jointly indicted—Misreception of evidence - - - - 490
See CRIMINAL LAW. 1.

CASES—*Attenborough* v. *St. Katharine's Dock Co.*, (1878) 3 C. P. D. 450, dicta in, followed - - - - 546
See PRACTICE. 4.

—— *Attorney-General* v. *Cockermouth Local Board*, (1874) L. R. 18 Eq. 172, approved and followed - - 72
See RAILWAY. 2.

—— *Attorney-General* v. *Great Western Railway*, (1872) L. R. 7 Ch. 767, approved and followed - - - - 72
See RAILWAY. 2.

—— *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*, (1882) 21 Ch. D. 752, approved and followed - - 72
See RAILWAY. 2.

—— *Bailey* v. *Watson & Co.*, [1898] 2 Q. B. 270, overruled - - - - 507
See COUNTY COURT. 3.

—— *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417, followed - - - - 835
See LANDLORD AND TENANT. 4.

—— *Baxendale* v. *London, Chatham and Dover Ry. Co.*, (1874) L. R. 10 Ex. 35, discussed - - - - 413
See DAMAGES.

—— *Blakeman* v. *Bristol and Exeter Railway*, (1858) 8 E. & B. 1035, approved - 145
See BAILMENT.

—— *Dodds* v. *South Shields Union*, [1895] 2 Q. B. 133, distinguished - - 667
See POOR-RATE. 2.

—— *Edwards* v. *Midland Ry. Co.*, (1880) 6 Q. B. D. 287, followed - - 392
See MALICIOUS PROSECUTION.

CASES—*continued.*

—— *Edwards* v. *Steel, Young & Co.*, [1897] 2 Q. B. 327, considered - - 38
See SHIP. 5.

—— *Hadley* v. *Baxendale*, (1854) 9 Ex. 341, followed - - - - 413
See DAMAGES.

—— *Hammond & Co.* v. *Bussey*, (1887) 20 Q. B. D. 79, followed - - - 413
See DAMAGES.

—— *Hurley, In re*, (1893) 10 Morr. 120, approved and followed - - - 626
See BANKRUPTCY. 2.

—— *Hyde* v. *Warden*, (1877) 3 Ex. D. 72, questioned - - - - 835
See LANDLORD AND TENANT. 4.

—— *Jones* v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484, followed - 250
See REVENUE. 3.

—— *Keeble* v. *Bennett*, [1894] 2 Q. B. 329, approved of - - - - 507
See COUNTY COURT. 3.

—— *Laskier* v. *Tekeian*, (1892) 67 L. T. 121, distinguished - - - - 266
See PRACTICE. 5.

—— *MacCarthy* v. *Young*, (1861) 6 H. & N. 329, approved - - - - 145
See BAILMENT.

—— *Mercer* v. *Vans Colina*, (1897) 67 L. J. (Q.B.) 424, followed - - 688
See BANKRUPTCY. 10.

—— *Midland Ry. Co.* v. *Withington Local Board*, (1883) 11 Q. B. D. 788, followed 693
See PUBLIC AUTHORITIES.

—— *Monks* v. *Jackson*, (1876) 1 C. P. D. 683, distinguished - - - 852
See MUNICIPAL CORPORATION. 2.

—— *Moule* v. *Garrett*, (1870) L. R. 5 Ex. 132; (1872) 7 Ex. 101, distinguished - 161
See LANDLORD AND TENANT. 6.

—— *North Eastern Railway* v. *Crosland*, (1863) 32 L. J. (Ch.) 353, distinguished 921
See RAILWAY. 3.

—— *Pearson* v. *McGowran*, (1825) 3 B. & C. 700, discussed - - - - 230
See CRIMINAL LAW. 4.

—— *Powell* v. *Brown*, [1899] 1 Q. B. 157, followed - - - - 1003
See EMPLOYER AND WORKMAN. 12.

—— *Pritchard* v. *Mayor of Bangor*, (1888) 13 App. Cas. 241, referred to - 852
See MUNICIPAL CORPORATION. 2.

—— *Reg.* v. *Plymouth (Mayor, &c., of)*, [1896] 1 Q. B. 158, considered - - 201
See FISHERY. 2.

—— *Reg.* v. *Sharman*, [1898] 1 Q. B. 578, distinguished - - - - 571
See LICENSING ACTS. 1.

—— *Rex* v. *Buttery*, cited in 4 B. & A. at p. 179, discussed - - - - 230
See CRIMINAL LAW. 4.

—— *Silver Valley Mines, In re*, (1882) 21 Ch. D. 381, principle in, extended - 961
See COMPANY. 2.

CASES—*continued.*

—— *Sutton* v. *Sutton*, (1882) 22 Ch. D. 511, distinguished - - - - 885
See LIMITATIONS, STATUTE OF. 2.

—— *Thames Conservators* v. *Inland Revenue Commissioners*, (1886) 18 Q. B. D. 279, commented on - - - 250
See REVENUE. 3.

—— *Thompson* v. *Lapworth*, (1868) L. R. 3 C. P. 149, followed - - - 474
See LANDLORD AND TENANT. 5.

—— *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166, considered - - 794
See STOCK EXCHANGE.

—— *Walker* v. *Nussey*, (1847) 16 M. & W. 302, followed - - - - 401
See SALE OF GOODS. 3.

—— *Waterhouse* v. *Keen*, (1825) 4 B. & C. 200, followed - - - - 693
See PUBLIC AUTHORITIES.

CERTIORARI—Confirmation of new licence—Excess of jurisdiction - - 571
See LICENSING ACTS. 1.

CHARGING ORDER—On dividend—Costs—Property recovered—Bankruptcy of judgment debtor - - - 863
See SOLICITOR.

CHARTERPARTY—Advance freight - 193
See SHIP. 2.

—— Breach of duty—Liability of charterer for defective condition of ship - 986
See NEGLIGENCE.

CHILD—Conscientious objection to medical aid—Neglect to procure—Manslaughter
See CRIMINAL LAW. 5. 283

CITATION—Parties—Res judicata—Will—Validity—Probate action - - 746
See ESTOPPEL.

COAL—Ticket in form in schedule - 449
See WEIGHTS AND MEASURES.

COLLATERAL NEGLIGENCE — Independent contractor — Liability of principal for negligence of - - - 221
See PRINCIPAL AND AGENT. 2.

COMPANY—*Money paid Ultra Vires by Directors to Shareholders—Order on Directors to Replace it—Right of Directors to Indemnity from Shareholders.*

Directors of a company, which had not obtained the sanction of the Court to a reduction of its capital, distributed a portion of the capital amongst the shareholders with their assent, and with notice of the fact that the money so distributed was part of the capital. The company was subsequently wound up, and the liquidator obtained an order that the directors should replace the money on the ground that the payment to the shareholders was ultra vires:—

Held, that the directors were entitled to an indemnity from the shareholders. MOXHAM *v.* GRANT - - - - - Div. Ct. 480

2. —— *Winding-up—Costs of Official Liquidator — Right to Appeal — Order to pay Costs personally.*

The principle laid down in *In re Silver Valley Mines*, (1882) 21 Ch. D. 381, that an official liquidator ordered to pay costs personally may appeal against such an order, extends to the case of an official receiver ordered to pay costs personally by a county court judge, and enables him to appeal against such an order to the Divisional Court. *In re* RAYNES PARK GOLF CLUB, LIMITED. *Ex parte* OFFICIAL RECEIVER - Div. Ct. 961

—— Assignment to one-man company—Fraudulent conveyance—Act of bankruptcy
See BANKRUPTCY. 3. 612

—— Debenture—Redemption on contingency—Stamp duty—"Marketable security"
See REVENUE. 6. 345

—— Stamp—Mortgage—Trust deed for securing debenture stock—Transfer of mortgage
See REVENUE. 4. 121

COMPENSATION — Agricultural holdings — Agreement—Tenant giving up possession before expiration of term - 465
See LANDLORD AND TENANT. 1.

—— Agricultural holdings — Improvements — Counter-notice of claim by landlord—Arbitration - - - - 559
See LANDLORD AND TENANT. 2.

—— Employer and workman.
See Cases under EMPLOYER AND WORKMAN.

—— Minerals—Notice of intention to work—Arbitration—Duty of company to take up award - - - - 921
See RAILWAY. 3.

—— Security for costs—Appeal under Workmen's Compensation Act, 1897 - 593
See PRACTICE. 8.

COMPETITION—Prize competition—Prediction of coming event—Births and deaths in London during named week - 198
See LOTTERY.

CONCEALMENT—Material facts—Contracts in which "uberrima fides" is required 782
See INSURANCE, GUARANTEE.

CONDITION—Not to commit breach of injunction—Condition depending on one event—Liquidated damages - - 382
See BOND.

—— Precedent—Shipment to be made within specified dates—Measure of damages
See SALE OF GOODS. 1. 436

—— Precedent to appeal—Question of law raised at trial—Request to make a note 501
See COUNTY COURT. 1.

CONSCIENTIOUS OBJECTION—Requirement of production of birth certificate - 577
See VACCINATION.

CONSEQUENTIAL DAMAGE — Underwriter's liability for—Cost of disposing of cargo rendered worthless by sea peril - 579
See INSURANCE, MARINE. 1.

CONSIDERATION—Assignment of leaseholds—Stamp duty—Rent - - 335
See REVENUE. 5.

CONTRACT—Avoidance of—Agent — Surreptitious dealing with other principal—Bribe accepted by agent - - 369
See PRINCIPAL AND AGENT. 1.

—— Carriage—Delay—Owner's risk note—Construction - - - - 309
See RAILWAY. 1.

—— Costs of reasonable defence by purchaser of action against him by sub-vendee 413
See DAMAGES.

—— "Differences"—"Cover" system—Gambling transaction—Nullity - - 794
See STOCK EXCHANGE.

—— Dismissal—Misconduct of servant—Forgetfulness - - - - 901
See MASTER AND SERVANT.

—— Guarantee—Concealment of material facts—Contracts in which "uberrima fides" is required - - - - 782
See INSURANCE, GUARANTEE.

—— Oral—Part payment—Statute of frauds 401
See SALE OF GOODS. 3.

—— Sale of lease—Act of bankruptcy by vendor before completion — Action to recover deposit - - - - 710
See BANKRUPTCY. 4.

—— Shipment to be made between specified dates—Condition precedent—Measure of damages - - - - 436
See SALE OF GOODS. 1.

CONTRACT DEBT—Simple contract debt charged on land—Period of limitation - 885
See LIMITATIONS, STATUTE OF. 2.

CONTRACTOR—Liability of principal for negligence of—Collateral negligence - 221
See PRINCIPAL AND AGENT. 2.

CONTRIBUTION —Co-sureties—Giving time to debtor - - - - 312
See PRINCIPAL AND SURETY.

CONVEYANCE — Fraudulent — Assignment to one-man company—Act of bankruptcy
See BANKRUPTCY. 3. 612

—— Stamp duty—Assignment of leaseholds—Consideration—Rent - - 335
See REVENUE. 5.

COPYHOLD—*Customary Obligation to Repair—Custom of the Manor—Breach of Obligation by Tenant—Remedy of Lord against Tenant's Executors.*

The testatrix of the defendants was admitted tenant for life of certain copyhold tenements of a manor. By the custom of the manor the tenants were bound to repair their tenements, and the only mode in which that obligation had been enforced had been by presentment, fine and forfeiture. Upon the death of the testatrix the premises were found to be out of repair. More than six months after the defendants, as her executors, had taken upon themselves the administration of her effects, the lord brought an action against them for dilapidations:—

Held, that the testatrix, by accepting the tenancy according to the custom of the manor, impliedly contracted to discharge the customary obligation to repair; that for the breach of her implied contract the lord was not confined to his

COPYHOLD—*continued.*

customary remedy by presentment, fine and forfeiture, but had a remedy by action; and that that remedy by action, sounding in contract and not in tort, survived against her executors. BLACKMORE *v.* WHITE.

Lord Russell of Killowen C.J. 293

CORPORATION—Action for malicious prosecution against—Liability - - 392
See MALICIOUS PROSECUTION.

—— Dissolution—Proof—Right of the Crown—Bona vacantia - - - 325
See BANKRUPTCY. 6.

—— Municipal corporation.
See Cases under MUNICIPAL CORPORATION.

COSTS—Action struck out for want of jurisdiction—Practice - - - - 430
See COUNTY COURT. 2.

—— "New street"—Paving expenses—Metropolis management - - - 681
See LONDON. 4.

—— Of reasonable defence by purchaser of action against him by sub-vendee 413
See DAMAGES.

—— Official liquidator—Right to appeal—Order to pay costs personally—Winding-up of company - - - - 961
See COMPANY. 2.

—— Property recovered—Bankruptcy of judgment debtor—Charging order on dividend - - - - - 863
See SOLICITOR.

—— Remitted action—Judgment under Order XIV. or part of claim—Recovery in county court of residue - - 507
See COUNTY COURT. 3.

—— Security for—Appeal under Workmen's Compensation Act, 1897 - - 593
See PRACTICE. 8.

—— Supply of water to house—Owner—Expenses - - - - 377
See LOCAL GOVERNMENT. 7.

—— Underwriter's liability for consequential damage—Cost of disposing of cargo rendered worthless by sea peril - 579
See INSURANCE, MARINE.

CO-SURETY—Giving time to debtor—Contribution - - - - - 312
See PRINCIPAL AND SURETY.

COUNTY—Transfer of part of one county to another county — Adjustment of liabilities - - - - 515
See LOCAL GOVERNMENT. 5.

COUNTY COURT — *Appeal — Question of Law raised at Trial—Request to make a Note—Condition Precedent to Appeal—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*Rules of Supreme Court*, 1883, *Order* LIX., *r.* 8.

It is a condition precedent to the right of appeal to the High Court from the judgment of a county court judge, under the County Courts Act, 1888, s. 120, that the question of law relied on in support of the appeal shall be raised at the trial, but a request to the judge to make a note is not

COUNTY COURT—*continued.*
a condition precedent, and therefore if the notes of the judge are not produced, the Court has jurisdiction, under the Rules of the Supreme Court, 1883, Order LIX., r. 8, if satisfied that the question of law was raised at the trial, to hear the appeal upon other evidence, though a request to make a note has not been made. WOHLGEMUTHE *v.* COSTE - - - **Div. Ct. 501**

2. —— *Costs—Action struck out for Want of Jurisdiction—Practice—County Courts Act*, 1888 (51 *& 52 Vict. c.* 43), *ss.* 88, 89, 113, 114.
Where an action in a county court is struck out for want of jurisdiction under s. 114 of the County Courts Act, 1888, the Court may, if it shall think just, award costs against the defendant. WATSON *v.* PETTS (No. 2) - **Div. Ct. 430**

3. —— *Costs — Remitted Action — Judgment under Order XIV. for Part of Claim—Recovery in County Court of Residue—Scale applicable in County Court—County Courts Act*, 1888 (51 *& 52 Vict. c.* 43), *s.* 65.
In an action brought in the High Court to recover 73*l.* 8*s.* 3*d.* as the price of goods sold and delivered an order was made under Order XIV. by which leave was given to the plaintiff to sign judgment for 53*l.* 8*s.* 3*d.*, and leave was given to the defendants to defend as to the residue of the claim, and it was ordered under s. 65 of the County Courts Act, 1888, that the action should be tried in the county court. The plaintiff signed judgment for 53*l.* 8*s.* 3*d.* under the order, and at the trial in the county court he recovered judgment for 20*l.*, the residue of his claim and costs:—
Held, that the plaintiff was entitled to have his costs in the county court taxed upon the scale applicable where the amount recovered exceeds 50*l.*
Keeble v. *Bennett*, [1894] 2 Q. B. 329, approved of.
Bailey v. *Watson & Co.*, [1898] 2 Q. B. 270, overruled. WHITE *v.* HEADLAND'S PATENT ELECTRIC STORAGE BATTERY COMPANY - **C. A. 507**

—— Practice — Special defence — Notice — Statutes of Limitation - - **953**
See LIMITATIONS, STATUTE OF. 1.

—— Prohibition to judge of—Appeal—Practice and procedure - - - **54**
See PRACTICE. 3.

—— Workmen's Compensation Act—New trial —Jurisdiction of county court judge
See EMPLOYER AND WORKMAN. 11. **805**

COUNTY COURT RULES, 1895, Order X., rr. 14a, 18a - - - - - **953**
See LIMITATIONS, STATUTE OF. 1.

COVENANT—Breach of—Forgetfulness by tenant —Equitable relief against forfeiture **835**
See LANDLORD AND TENANT. 4.

—— Stamp duty—Agreement to execute mortgage - - - - - **361**
See REVENUE. 7.

—— To bear charges—Expenses of paving new street—Payment by landlord—Right to recover from tenant - - **474**
See LANDLORD AND TENANT. 5.

"COVER" — Contract — "Differences" — Gambling transaction—Nullity - **794**
See STOCK EXCHANGE.

CREDITOR — Execution creditor — Rights of — Administration of estate of deceased debtor — Execution not completed by sale - - - - - **699**
See BANKRUPTCY. 5.

CRIMINAL LAW—*Evidence—Misreception of—Prisoners jointly Indicted—Case stated on behalf of one Prisoner only*—11 *& 12 Vict. c.* 78, *s.* 2.
Where two prisoners jointly indicted have been convicted, and a question has been reserved for the consideration of the Court for Crown Cases Reserved on behalf of one of them, that Court has power, under 11 & 12 Vict. c. 78, s. 2, if it shall be of opinion that the objection raised is valid and that it affects the conviction of both prisoners, to quash the conviction of the other prisoner as well as that of the prisoner on whose behalf the question has been reserved. THE QUEEN *v.* SAUNDERS - - - **C. C. R. 490**

2. —— *Evidence—Right of Counsel for Prosecution to sum up where Prisoner gives Evidence—Criminal Evidence Act*, 1898 (61 *& 62 Vict. c.* 36), *ss.* 2, 3.
Where, upon the trial of an indictable offence, the person charged gives evidence in his own behalf, but does not call witnesses, the counsel for the prosecution is entitled, immediately after the person charged has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged. THE QUEEN *v.* GARDNER **C. C. R. 150**

3. —— *False Pretences—Evidence of Subsequent Frauds—Right of Prisoner to give Evidence before Grand Jury — Right of Court to Comment on Prisoner's Failure to give Evidence—Criminal Evidence Act*, 1898 (61 *& 62 Vict. c.* 36), *s.* 1.
On the trial of an indictment for obtaining eggs by false pretences, it was proved that the prisoner had falsely represented by advertisements in newspapers that he was carrying on a bonâ fide dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements:—
Held, that the evidence was properly admitted.
The Criminal Evidence Act, 1898, does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury, nor does it deprive the Court of the right to comment on the failure of the prisoner to give evidence at the trial. THE QUEEN *v.* RHODES - **C. C. R. 77**

4. —— *False Pretences—Jurisdiction—False Pretences made in Scotland—Goods obtained in England—Debtors Act*, 1869 (32 *& 33 Vict. c.* 62), *s.* 11, *sub-s.* 13; *s.* 13, *sub-s.* 1.
The defendant, who carried on business in the county of Durham, obtained goods on credit in that county from a traveller of the prosecutors by means of false representations made by the defendant to the prosecutors in Glasgow, in which place they carried on business:—
Held, that the offence was properly triable in the county of Durham.

CRIMINAL LAW—*continued.*

Per Hawkins, Wills, and Bruce JJ., on the ground that the offence consisted in obtaining the goods, and not in making the false pretences whereby they might be obtained, and that therefore an English Court has jurisdiction to try a charge of obtaining goods by false pretences where the goods have been obtained within the jurisdiction of the Court dealing with the charge, although the false representations may have been made beyond the jurisdiction of the English Courts.

Per Wright J., on the ground that, under the circumstances disclosed in the case, the possession of the goods by the defendant might be treated as a possession in the county of Durham under a representation made in Glasgow and continuing in the county of Durham.

Rex v. *Buttery*, cited in 4 B. & A. at p. 179, and *Pearson* v. *McGowran*, (1825) 3 B. & C. 700, discussed. THE QUEEN *v.* ELLIS - **C. C. R. 230**

5. —— *Offences against the Person — Manslaughter—Infant Child—Neglect to procure Medical Aid—Conscientious Objection to Medical Aid—"Wilfully neglect"—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict. c.* 41), *s.* 1.

By the Prevention of Cruelty to Children Act, 1894, s. 1: "If any person . . . . who has the custody, charge, or care, of any child . . . . wilfully . . . . neglects . . . . such child . . . . in a manner likely to cause such child . . . . injury to its health . . . . that person shall be guilty of a misdemeanour."

The prisoner was charged with the manslaughter of his infant child, of which he had the custody. He belonged to a sect who objected on religious grounds to calling in medical aid, and to the use of medicine, and he had wilfully and deliberately abstained from providing medical aid and medicine, which were necessary for the child, though he knew it to be dangerously ill, but in other respects he had done all he could in the best interests of the child. Medical aid would have prolonged, and probably saved, the child's life, and the prisoner had the means to procure medical aid:—

Held, that there was evidence that the prisoner had wilfully neglected the child in a manner likely to cause injury to its health, within the meaning of the Act, and having thereby caused or accelerated its death, he was rightly convicted of manslaughter. THE QUEEN *v.* SENIOR **C. C. R. 283**

6. —— *Vagrant Acts—Pretending to tell Fortunes—Intent to Deceive—Rogue and Vagabond—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

By the Vagrancy Act, 1824, s. 4, "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects," shall be deemed to be a rogue and a vagabond, and be liable to penalties.

A person was convicted of being a rogue and vagabond, for that she did unlawfully pretend to tell fortunes. The information alleged that the defendant did pretend or profess to tell fortunes. The justices were satisfied on the evidence that the defendant had unlawfully pretended to tell fortunes to deceive and impose upon certain of Her Majesty's subjects.

On the argument of an order nisi for a certiorari to remove and quash the conviction:—

Held, that, in order to justify a conviction under the statute, there must be an intent to deceive, but that the intent was implied in the words "pretending or professing," and therefore it was unnecessary that the intent should be specifically alleged, and the conviction was good. THE QUEEN *v.* ENTWISTLE. *Ex parte* JONES **Div. Ct. 846**

—— Appeal—Jurisdiction—Criminal cause or matter—Application to enforce general district rate - - - - **273**
See PRACTICE. 2.

—— Right of action—Person induced by misrepresentation to commit crime - **816**
See FOREIGN ENLISTMENT.

CROWN — Proof — Corporation — Dissolution — Right of the Crown—Bona vacantia
See BANKRUPTCY. 6. **325**

CRUELTY—Infant child—Conscientious objection to medical aid—Neglect to procure—Manslaughter - - - **283**
See CRIMINAL LAW. 5.

CUSTOM—Copyholds—Repairs—Breach of obligation by tenant — Remedy of lord against tenant's executors - **293**
See COPYHOLD.

CUSTOMS AND INLAND REVENUE.
See Cases under REVENUE.

DAMAGES—*Contract—Costs of Legal Proceedings—Sale of Goods—Sub-sale—Costs of Reasonable Defence by Purchaser of Action against him by Sub-vendee.*

The plaintiff, a coal merchant at Cardiff, having contracted with shipowners for the supply of coal to their steamers there, entered into a contract with the defendants, who were colliery proprietors also carrying on business at Cardiff, for the supply to him of coal, which was expressly stated to be for shipment in those steamers. The defendants committed a breach of their contract in not supplying coal under it with reasonable despatch, in consequence of which the supply of coal to one of the steamers by the plaintiff was delayed and the steamer was detained. The shipowners thereupon made a claim of 150*l.* upon the plaintiff in respect of her detention, and subsequently brought an action against him to enforce their claim. The plaintiff gave notice of the claim and action to the defendants, who repudiated all liability, and refused to take up the defence, stating however that they considered the claim preposterous, and the amount of it excessive. The plaintiff thereupon defended the action, paying 20*l.* into court, and at the trial he succeeded in shewing that the sum so paid in was sufficient. He then brought an action against the defendants for breach of their contract. The judge at the trial found that the course taken by the plaintiff in defending the action against him was reasonable:—

Held, that the plaintiff was entitled under

DAMAGES—*continued.*
the rule in *Hadley* v. *Baxendale*, (1854) 9 Ex. 341, to recover from the defendants as damages the amount of the costs reasonably incurred by him in defending the action against him over and above the amount which he had received for costs as between party and party from the plaintiffs in that action.
Hammond & Co. v. *Bussey*, (1887) 20 Q. B. D. 79, followed.
Baxendale v. *London, Chatham and Dover Ry. Co.*, (1874) L. R. 10 Ex. 35, discussed. AGIUS *v.* GREAT WESTERN COLLIERY COMPANY C. A. 413
—— Claim for—Parties—Joinder of defendants—Separate causes of action - 840
See PRACTICE. 6.
—— Liquidated—Condition not to commit breach of injunction—Condition depending on one event - - - - 382
See BOND.
—— Measure of—Shipment to be made between specified dates—Condition precedent
See SALE OF GOODS. 1. 436
DANGEROUS MACHINERY — Factories and workshops — Accident to workman — Compensation - - - 773
See EMPLOYER AND WORKMAN. 7.
DANGEROUS STRUCTURE — Disturbance of pavement—Duty to restore pavement after hoarding removed - - 720
See LONDON. 1.
DEATH—Action against partners in firm name—Death of partner after appearance—Form of defence of surviving partner
See PRACTICE. 1. 714
DEBENTURE—Stamp—Trust deed for securing debenture stock—Transfer of mortgage
See REVENUE. 4. 121
—— Stamp duty—Redemption on contingency—"Marketable security" - - 345
See REVENUE. 6.
DEBT—Executor—Assets paid to official receiver without retaining debt—Mistake—Repayment - - - - 905
See BANKRUPTCY. 9.
—— Simple contract debt charged on land—Period of limitation - - 885
See LIMITATIONS, STATUTE OF. 2.
—— Sum due under maintenance order—Recoverable as a civil debt—Summary jurisdiction - - - - 305
See POOR LAW.
DEBTOR — Costs — Property recovered — Bankruptcy of judgment debtor—Charging order on dividend - - - 863
See SOLICITOR.
—— Co-sureties—Giving time to debtor—Contribution - - - - 312
See PRINCIPAL AND SURETY.
—— Execution—Continued possession at request of debtor—Sheriff's fees - - 626
See BANKRUPTCY. 2.
DEBTORS ACT, 1869—False pretences made in Scotland—Goods obtained in England—Jurisdiction - - - 230
See CRIMINAL LAW. 4.
DEFAMATION—*Libel*—*Trader*—*Disparagement of Goods*—*Slander of Goods*—*Comparison of Plaintiff's Goods with those of Defendant*—*Cause of Action*—*Rules of Supreme Court, Order* XXV., *rr.* 2, 4.
H., a manufacturer of zinc paint, by his statement of claim alleged that the defendant W. was "falsely and maliciously" publishing in China and Japan copies of a report of experiments testing the zinc paints of H. and W., in which report the experimenter certified that W.'s paint had a slight advantage over H.'s, but that for all practical purposes they could be regarded as equal. The statement of claim went on to allege that the report, and each statement in it, was untrue, that H.'s paint was not equal or inferior, but superior to W.'s, and that H. had by reason of the premises been injured in his business and credit. W. applied to strike out the statement of claim as shewing no reasonable cause of action. The master made an order for striking out the statement of claim unless within a limited time H. amended it by alleging special damage with full particulars. Kennedy J. discharged this order:—
Held, on appeal, that a statement by a trader that his own goods are superior to those of another trader, even if untrue and the cause of loss to the other trader, gives no cause of action; that the allegation that the statement was made maliciously could not convert a statement primâ facie lawful into one primâ facie unlawful; that the allegation and proof of special damage would not improve the plaintiff's case; and that judgment in the action must be entered for the defendant under Order XXV., r. 4. HUBBUCK & SONS, LIMITED *v.* WILKINSON, HEYWOOD & CLARK, LIMITED - - - - - C. A. 86
2. —— *Privilege*—*Judicial Proceeding*—*Petition for Order for Reception of Lunatic*—*Defamatory Statement in Particulars*—*Immunity from Action*—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5).
A justice of the peace, or other judicial authority, to whom an application is made, under the Lunacy Act, 1890, on a petition for an order for the reception and detention of a lunatic, is acting judicially, and consequently defamatory statements made in the course of the proceedings are not actionable. HODSON *v.* PARE - C. A. 455
DELAY—Contract of carriage—Owner's risk note—Construction - - - 309
See RAILWAY. 1.
"DEPENDANTS" — Workmen's Compensation Act, 1897 - - - - 1005
See EMPLOYER AND WORKMAN. 10.
DEPOSIT—Action to recover—Contract for sale of lease—Act of bankruptcy by vendor before completion - - - 710
See BANKRUPTCY. 4.
DETERMINATION—Tenancy at will—Doing of repairs by landlord - - 486
See LIMITATIONS, STATUTE OF. 4.
—— Tenancy at will—Mortgage—Creation of fresh tenancy - - - 994
See LIMITATIONS, STATUTE OF. 3.

DEVIATION—Drainage of group of houses by combined operation—Subsequent deviation—Sewer—Nuisance - - 972
See LONDON. 2.

"DIFFERENCES"—Contract—"Cover" system—Gambling transaction—Nullity 794
See STOCK EXCHANGE.

DIRECTIONS—Summons for—Notice of trial—Assizes—Jurisdiction - - 266
See PRACTICE. 5.

DIRECTOR—Money paid ultra vires by directors to shareholders—Right of directors to indemnity from shareholders - 480
See COMPANY. 1.

DISMISSAL—Forgetfulness—Contract—Misconduct of servant - - - 901
See MASTER AND SERVANT.

DISQUALIFICATION—"Candidate"—Nomination of disqualified person—Election—Right to petition - - - 852
See MUNICIPAL CORPORATION. 2.

DISSOLUTION—Corporation—Proof—Right of the Crown—Bona vacantia - 325
See BANKRUPTCY. 6.

DISTRESS—Goods impounded on premises—Man in possession - - - 470
See LANDLORD AND TENANT. 3.

—— Poor-rate—Distress warrant—Appeal 532
See POOR-RATE. 1.

DRAIN—Sewer—Drainage of group of houses by combined operation—Subsequent deviation—Nuisance - - - 972
See LONDON. 2.

DRUGS—Food and—Liability of innocent vendor for milk adulterated in transit - 20
See ADULTERATION.

DUPLICATE ENTRIES—Notice of selection—Appeal from revising barrister - 109
See PARLIAMENT. 4.

DUTY—Public revenue.
See Cases under REVENUE.

EDUCATION ACTS—*Employment of Child by Parent "for purposes of gain" — Elementary Education Act*, 1876 (39 & 40 *Vict. c.* 79), *s.* 47.

By s. 6 of the Elementary Education Act, 1876, a person who takes into his employment a child, between the ages of ten and fourteen, who is not exempted from school attendance, is liable to a penalty.

By s. 47, "a parent of a child who employs such child in any labour exercised by way of trade or for the purposes of gain shall be deemed for the purposes of this Act to take such child into his employment."

The respondent, in order to enable his wife to go out and earn money, kept his daughter, a child of the age of thirteen who was not exempted from school attendance, at home to do the housework:—

Held, that he did not thereby employ the child for the purposes of gain so as to render himself liable to the penalty imposed by s. 6. MATHER *v.* LAWRANCE - - - Div. Ct. 1000

ELECTION—"Candidate"—Right to petition—Nomination of disqualified person 852
See MUNICIPAL CORPORATION. 2.

ELEMENTARY EDUCATION - - 1000
See EDUCATION ACTS.

EMPLOYER AND WORKMAN—*Compensation—Accident — Personal Injury by — Employment — Building exceeding thirty feet in height—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *s.* 7, *sub-s.* 1.

Where an accident happens to a workman employed on, in, or about a building in the course of construction which, although intended when completed to exceed thirty feet in height, does not at the time of the accident exceed that height, the Workmen's Compensation Act, 1897, does not apply. BILLINGS *v.* HOLLOWAY.
C. A. 70

2. —— *Compensation — Accident — Personal Injury by—Employment on or about Machinery or Plant — Ship unloading in Dock — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *s.* 7, *sub-ss.* 1, 2.

Where a ship was unloading in a dock by means of a crane on the quay hired by her owners, and a workman employed by them in unloading her was killed by the explosion of a case of percussion-caps which he was placing in a basket attached to the chain of the crane for the purpose of its being hoisted out of the ship on to the quay:—

Held, that the accident arose out of and in the course of the workman's employment on or about machinery used in the process of unloading to a quay within the meaning of the Workmen's Compensation Act, 1897, and therefore the Act applied to it. WOODHAM *v.* ATLANTIC TRANSPORT COMPANY — - - - - C. A. 15

3. —— *Compensation—Accident to Workman —"Arising out of and in the course of the Employment"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A boy was employed in a pottery; his duty was to make balls of clay and hand them to the woman working at a machine, and he was forbidden to interfere in any way with the machinery. He sustained an injury through attempting to clean the machine while the woman was temporarily absent:—

Held, that the accident did not arise out of or in the course of his employment, and therefore he was not entitled to compensation under the Workmen's Compensation Act, 1897. LOWE *v.* PEARSON - - - - C. A. 261

4. —— *Compensation—Accident arising out of or in Course of Employment—Act done upon Emergency—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

An accident happening to a workman who, while in his master's employment and on his master's work, does upon an emergency an act in the interests of his master outside the scope of what he was employed to do, and suffers injury while doing the act, is within the purview of the Workmen's Compensation Act, 1897.

A fireman employed in a coal-mine was in the course of his duty carrying a report of the state of the mine from the pit's mouth to the

office; the horse drawing the tramway truck in which he was riding ran away, and in endeavouring to stop it he fell and was killed:—

Held, that the accident arose out of or in the course of the workman's employment within the meaning of s. 1, sub-s. 1, of the Act. REES *v.* THOMAS - - - - C. A. 1015

5. —— *Compensation—Accident to Workman—Average Weekly Earnings—Alteration of Character of Employment and Rate of Pay—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I.*, 1 (*b*).

A workman was employed for a period of twelve months by the same employer. During that period the character of his employment was altered and the amount of his wages increased. At the end of the twelve months he met with an accident which partly incapacitated him:—

Held, that the change in the character of the employment did not affect the compensation to which he was entitled, under the first schedule to the Workmen's Compensation Act, 1897, which should be arrived at from his average weekly earnings during the whole of the previous twelve months. PRICE *v.* J. MARSDEN & SONS C. A. 493

6. —— *Compensation—Accident to Workman—Employment "about" a Factory—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A cart, belonging to the owners of a factory, was standing in a street, close to the entrance to the factory yard, in a position in which it was usually loaded. A workman in the employment of the factory owners was engaged in loading the cart, and was injured while doing so. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge, before whom the claim came, held that the employment was "about" a factory within the meaning of s. 7, sub-s. 1, and awarded compensation. On appeal:—

Held, that the section includes the case of employment in proximity to a factory, and that consequently it was a question for the arbitrator to determine whether, as a matter of fact, the employment was in proximity to the employer's factory. POWELL *v.* BROWN - - C. A. 157

7. —— *Compensation—Accident to Workman—Employment in, on, or about a Factory—Machinery to which any provision of the Factory Acts applies—Dangerous Machinery in a Factory—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *ss.* 4, 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

By s. 4 of the Factory and Workshop Act, 1895, power is given to a court of summary jurisdiction to make an order as to a dangerous machine used in a factory or workshop.

By s. 23, sub-s. 1 (v.) (*b*), of the same Act this provision, among others, "shall have effect as if any premises on which machinery worked by steam . . . . is temporarily used for the purpose of the construction of a building . . . . were included in the word factory."

By s. 7 of the Workmen's Compensation Act, 1897, "factory includes any . . . . machinery . . . . to which any provision of the Factory

Acts is applied by the Factory and Workshop Act, 1895."

A workman was employed in a shed to look after a steam-engine connected with a mortar pan for mixing mortar for use on a building near at hand. While so employed he sustained personal injuries through an accident. On a claim under the Workmen's Compensation Act, 1897:—

Held, that, as the engine was being temporarily used for the purpose of the construction of a building, the provisions mentioned in s. 23 of the Factory and Workshop Act, 1895, had effect as if the shed were a factory; so that a provision of the Act, namely, s. 4, relating to the power to make an order as to a dangerous machine used in a factory, applied to the engine, which therefore came within the definition of a factory in s. 7 of the Workmen's Compensation Act, 1897, and compensation could be claimed under that section. MCNICHOLAS *v.* DAWSON & SON C. A. 773

8. —— *Compensation—Accident to Workman "arising out of and in the course of the Employment"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

A ticket-collector got upon the footboard of a train, after it had started, not for any object of his employment, but for his own pleasure. In getting off he was injured:—

Held, that the accident was not one "arising out of" his employment within s. 1 of the Workmen's Compensation Act, 1897, and that compensation was not recoverable under the Act. SMITH *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY - - - - C. A. 141

9. —— *Compensation—Building repaired by means of a "Scaffolding"—"Repairs"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, the Act is to apply (inter alia) to employment "on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding."

The outside of a house, more than thirty feet high, was being painted by workmen using ladders for the purpose; one of the men was killed by the breaking of the rung of the ladder on which he was standing. There was a board, one end of which was tied to a rung of one of the ladders, the other end resting on the sill of a window:—

Held, that the house was not being constructed or repaired by means of a scaffolding, and that the Act did not apply.

Painting the outside of a house is not "repair," nor are ladders "scaffolding" within the meaning of the above section. WOOD *v.* WALSH & SONS - - - - - C. A. 1009

10. —— *Compensation—"Dependants"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

By s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, the word "dependants" means "in England and Ireland, such members of the

EMPLOYER AND WORKMAN—*continued.*

workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death":—

Held, that, in order to bring himself within the Act as a dependant, an applicant for compensation must shew that he was to some extent dependent upon the earnings of the deceased workman for the ordinary necessaries of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings. Whether an applicant is in that sense a dependant is a question of fact in each particular case. SIMMONS *v.* WHITE BROTHERS - - - **C. A. 1005**

11. —— *Compensation — Jurisdiction of County Court Judge—New Trial — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 3.

A county court judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1897, is acting as an arbitrator only, and has no jurisdiction to grant a new trial. MOUNTAIN *v.* PARR - **C. A. 805**

12. —— *Compensation—Personal Injury by Accident — Employment "about" a Factory — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A carter, in the employment of the owners of a factory, was injured while unloading goods from a cart of his employers at a distance of a mile and a half from the factory. On a claim for compensation under the Workmen's Compensation Act, 1897, the county court judge, before whom the claim came, held that the employment was not "about" a factory within the meaning of s. 7, sub-s. 1, of the Act:—

Held, that, while employment "about" a factory included employment in close proximity to a factory, the county court judge had rightly found as a fact that employment at the distance of a mile and a half was not employment "about" a factory within the meaning of the Act.

Powell v. *Brown*, [1899] 1 Q. B. 157, followed. LOWTH *v.* IBBOTSON - - - **C. A. 1003**

13. —— *Compensation—Personal Injury to Workman—Height of Building—Construction or Repair — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

A building, which measured twenty-eight feet in height from the ground to the parapet and thirty-six feet to the ridge of the roof, was erected as stables for an omnibus company. Six months after its completion and after the commencement of its use as stables the company employed a firm of ironmasters to strengthen the building by introducing iron stays which were fastened to the girders and the upright iron columns supporting the building. A workman in the employ of the ironmasters, while standing inside the building at a height of eight feet from the ground upon a structure composed of scaffold boards resting on ledgers secured to the iron columns and supported in the middle by trestles, fell while lifting one of the iron stays and received injuries which proved fatal:—

Held, that the building was a building exceeding thirty feet in height within the meaning

EMPLOYER AND WORKMAN—*continued.*

of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897; that for the purposes of that section it was immaterial whether the scaffolding was inside or outside the building; but that the building was not being "constructed or repaired," and that therefore the employment was not "an employment on, in, or about a building which exceeds thirty feet in height and is either being constructed or repaired by means of a scaffolding," within the meaning of that section. HODDINOTT *v.* NEWTON, CHAMBERS & Co. **C. A. 1018**

14. —— *Compensation for Injury by Accident —Employment — Building not exceeding Thirty Feet in Height—Machinery—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

The Workmen's Compensation Act, 1897, applies to employment on, in, or about a building on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof, although the building does not exceed thirty feet in height. MELLOR *v.* TOMKINSON & Co. - - - - **C. A. 374**

—— Dismissal—Forgetfulness — Misconduct of servant - - - - **901**
See MASTER AND SERVANT.

—— Policy of insurance against accident—Stamp duty - - - - - **353**
See REVENUE. 8.

—— Security for costs—Appeal under Workmen's Compensation Act, 1897 - **593**
See PRACTICE. 8.

EMPLOYMENT—Of child by parent "for purposes of gain" - - - **1000**
See EDUCATION ACTS.

ENTRY—By opening unlocked shop door—Loss by theft—"Actual forcible and violent entry" - - - - **595**
See INSURANCE, BURGLARY.

—— Jurisdiction—Order for entry on premises Local authority—Water-closets - **751**
See JUSTICES.

ESTOPPEL — *Res Judicata — Will — Validity — Probate Action—Citation of Parties—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 63.

Where the heir-at-law of a testator is made defendant, as one of the testator's next of kin, in a probate action to establish his will, and appears and contests its validity in the action, he cannot afterwards dispute the validity of the will in respect of real estate affected by it, notwithstanding that he was not cited to appear in the action as heir-at-law. BEARDSLEY *v.* BEARDSLEY - - - - **Div. Ct. 746**

—— Interpleader—Bailee—Right to set up jus tertii - - - - - **546**
See PRACTICE. 4.

EVIDENCE—Criminal Evidence Act, 1898—Right of counsel for prosecution to sum up where prisoner gives evidence **150**
See CRIMINAL LAW. 2.

—— Criminal Evidence Act, 1898—Right of Court to comment on prisoner's failure to give evidence - - - **77**
See CRIMINAL LAW. 3.

EVIDENCE—*continued.*

—— Misreception of evidence—Prisoners jointly indicted—Case stated on behalf of one prisoner only - - - 490
See CRIMINAL LAW. 1.

—— Of injury—Public body—Infringement of statute—Injunction—Speed of trains 72
See RAILWAY. 2.

EXECUTION—Receiving order—Sheriff—Sale—Poundage - - - - 460
See BANKRUPTCY. 8.

—— Seizure of goods and possession of sheriff for twenty-one days—Act of bankruptcy - - - - 626
See BANKRUPTCY. 2.

EXECUTION CREDITOR—Rights of—Administration of estate of deceased debtor—Execution not completed by sale 699
See BANKRUPTCY. 5.

EXECUTOR—Retainer—Assets paid to official receiver without retaining debt—Mistake—Repayment - - - 905
See BANKRUPTCY. 9.

EXEMPTION—Rates—Liability to repair ratione tenuræ—Sum paid in discharge of liability - - - - 1026
See HIGHWAY.

FACTOR—Possession of document of title—Consent of seller—Stoppage in transitu 643
See SALE OF GOODS. 2.

FACTORY—Dangerous machinery in a factory—Accident to workman—Compensation
See EMPLOYER AND WORKMAN. 7. 773

—— Employment "about" a factory—Accident—Compensation - - - 1003
See EMPLOYER AND WORKMAN. 12.

FALSE DESCRIPTION—"Physician" - 634
See MEDICAL PRACTITIONER.

FALSE PRETENCES—Made in Scotland—Goods obtained in England—Debtors Act—Jurisdiction - - - 230
See CRIMINAL LAW. 4.

—— Right of Court to comment on prisoner's failure to give evidence - - 77
See CRIMINAL LAW. 3.

FALSE REPRESENTATION—Right of action—Person induced by misrepresentation to commit crime - - - 816
See FOREIGN ENLISTMENT.

FINE—Engaging seamen for foreign ship—Civil debt - - - - - 964
See SHIP. 3.

FISHERY—*Salmon Fishery Acts—Offences under—Justices—Summary Proceedings—Limitation of Time—Recovery of Penalty—Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 62—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

The effect of s. 62 of the Salmon Fishery Act, 1873, and s. 11 of the Summary Jurisdiction Act, 1848, is that a penalty for an offence under the Salmon Fishery Acts may be recovered summarily if the complaint be made within six months from the commission of the offence.
MORRIS *v.* DUNCAN - - - Div. Ct. 4

FISHERY—*continued.*

2. —— *Sea Fisheries—Fisheries Committee—Conditions as to Expenditure—Power of one of several Councils to impose—Sea Fisheries Regulation Act*, 1888 (51 & 52 *Vict. c.* 54), *s.* 6, *sub-s.* 1.

Where a local sea fisheries committee contains representatives of more than one county or borough council, it is not open to any one of such councils to make conditions or restrictions as to expenditure under s. 6, sub-s. 1, of the Sea Fisheries Regulation Act, 1888, but the conditions or restrictions referred to in that subsection can only be imposed by the common agreement of all the councils represented on the committee.

Reg. v. *Mayor, &c., of Plymouth*, [1896] 1 Q. B. 158, considered. THE QUEEN *v.* NORTH RIDING OF YORKSHIRE COUNTY COUNCIL - Div. Ct. 201

FOOD AND DRUGS—Liability of innocent vendor for milk adulterated in transit - 20
See ADULTERATION.

FOREIGN ENLISTMENT—*False Representation—Right of Action—Person induced by Misrepresentation to Commit Crime—Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90), *s.* 11.

Where a person is induced by the fraudulent misrepresentation of another to do an act which, in consequence of such misrepresentation, he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act. BURROWS *v.* RHODES AND JAMESON - - - Div. Ct. 816

FOREIGN SHIP—Engaging seamen for—Fine—Civil debt - - - - 964
See SHIP. 3.

FORFEITURE—Equitable relief against—Forgetfulness—Breach of covenant—Right of re-entry - - - - 835
See LANDLORD AND TENANT. 4.

FORGETFULNESS—Breach of covenant—Right of re-entry—Equitable relief against forfeiture - - - - 835
See LANDLORD AND TENANT. 4.

—— Dismissal—Contract—Misconduct of servant
See MASTER AND SERVANT. 901

FORTUNE TELLER—Pretending to tell fortunes—Vagrancy - - - 846
See CRIMINAL LAW. 6.

FRANCHISE.
See Cases under PARLIAMENT.

FRAUDS, STATUTE OF—Oral contract—Part payment - - - - 401
See SALE OF GOODS. 3.

FRAUDULENT CONVEYANCE—Assignment to one-man company—Act of Bankruptcy
See BANKRUPTCY. 3. 612

FREIGHT—Charterparty—Advance freight 193
See SHIP. 2.

FRIENDLY SOCIETY—*Nomination by Member—Amount insured exceeding* 100*l.*—*Revocation by subsequent Will—Friendly Societies Act*, 187.) (38 & 39 *Vict. c.* 60), *s.* 15, *sub-s.* 3.

A nomination made by a member of a friendly

FRIENDLY SOCIETY—*continued.*
society under s. 15, sub-s. 3, of the Friendly Societies Act, 1875, to an amount not exceeding 100*l.* is valid, although the total amount payable by the society on the death of the nominator exceeds that sum. Such a nomination is not revocable in any manner other than that prescribed by the sub-section, and therefore is not revocable by a subsequent will of the nominator. BENNETT *v.* SLATER - - - **C. A. 45**

GAMING—*Betting—Defined Place where Betting carried on—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The respondent, a bookmaker, and his clerk entered inclosed grounds in which horse-races were being carried on, and put up a cane structure about five feet high with four legs or supports, and having on the top a board on which were painted the words "Bob Patch" (the respondent's name), "London. All in run or not —pay first past the post." Before each race the odds offered by the respondent against the various horses running were written on the board. He stood on a box placed close to the structure, and invited people to bet with him; and, assisted by his clerk who stood near, made bets on each race with backers of the horses running:—

Held, on these facts, that the respondent had used a "place for the purpose of betting with persons resorting thereto," within the meaning of 16 & 17 Vict. c. 119, s. 1. BROWN *v.* PATCH **Div. Ct. 892**

—— Betting—Private ground used for—"Place of public resort"—By-laws—Validity *See* MUNICIPAL CORPORATION. 1. **425**

—— Contract—"Differences"—"Cover" system—Gambling transaction—Nullity **794** *See* STOCK EXCHANGE.

GOODS—Impounding on premises—Distress—Man in possession - - - **470** *See* LANDLORD AND TENANT. 3.

—— Sale of - - - - **401, 436** *See* SALE OF GOODS. 1, 3.

—— Slander of—Comparison of plaintiff's goods with those of defendant—Cause of action *See* DEFAMATION. 1. **86**

GUARANTEE—Concealment of material facts—Contracts in which "uberrima fides" is required - - - - **782** *See* INSURANCE, GUARANTEE.

HIGHWAY—*Rate—Exemption—Liability to Repair Ratione Tenuræ—Sum Paid in Discharge of Liability—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33—*Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 25, 29.

In a hamlet forming part of a township all the highways were repairable by the occupiers of lands ratione tenuræ, and highway rates were not leviable by reason of the exemption in the Highway Act, 1835, s. 33. A railway company occupied lands in the hamlet, and, prior to the after-mentioned order, were liable ratione tenuræ to repair a portion of a highway therein. An order was made by justices under the Highway Act, 1862, s. 35, by which it was declared that all the highways in the hamlet should be parish highways, and be repaired by the highway board of the district in which the hamlet was situated, and the sums to be paid by the respective occupiers of lands previously liable ratione tenuræ for the repair of the highways in discharge of their liability were fixed. These sums were duly paid. The company were subsequently rated in respect of their lands in the hamlet for expenses incurred in the repair of highways within the district including those in the hamlet:—

Held (reversing the judgment of Wills and Kennedy JJ.), that the order made by justices as above mentioned did not operate to deprive the railway company of their previously existing exemption from highway rates, and that the company were therefore exempt from payment of so much of the rate as was levied in respect of the repair of highways in the hamlet:

Held, also, that the exemption was not destroyed by the Local Government Act, 1894. NORTH EASTERN RAILWAY COMPANY *v.* DALTON OVERSEERS - - - - **C. A. 1026**

HIRING AGREEMENT — In consideration of yearly payment—Stamp - - **250** *See* REVENUE. 3.

HOARDING — Dangerous structures — Disturbance of pavement—Duty to restore pavement after hoarding removed - **720** *See* LONDON. 1.

HOUSE OF COMMONS—Offences—Sale without licence—Sale by servant of the House *See* LICENSING ACTS. 2. **7**

HUSBAND AND WIFE—Bankruptcy notice—Married woman trading separately from husband in firm name—Receiving order *See* BANKRUPTCY. 1. **566**

IMPOUNDING—Goods—Distress—Man in possession - - - - **470** *See* LANDLORD AND TENANT. 3.

IMPROVEMENTS — Agricultural holdings — Compensation—Counter-notice of claim by landlord—Arbitration - - **559** *See* LANDLORD AND TENANT. 2.

INCOME TAX—Exemption — Property legally appropriated for the promotion of science - - - - **871** *See* REVENUE. 2.

—— Profits of trade—Deduction for depreciation of machinery or plant - - **865** *See* REVENUE. 1.

INDEMNITY—Money paid ultra vires by directors to shareholders—Right of directors to indemnity - - - **450** *See* COMPANY. 1.

—— Rent—Payment by lessee—Liability of sublessee - - - - **161** *See* LANDLORD AND TENANT. 6.

INFANT—Neglect to procure medical aid—Conscientious objection—Manslaughter *See* CRIMINAL LAW. 5. **283**

INJUNCTION—Condition not to commit breach of—Condition depending on one event—Liquidated damages - - 382
See BOND.

—— Public body—Infringement of statute—Evidence of injury—Speed of trains 72
See RAILWAY. 2.

INJURY—Accident—Compensation.
See Cases under EMPLOYER AND WORKMAN.

—— Evidence of—Level crossing—Speed of trains—Injunction - - - 72
See RAILWAY. 2.

—— Gratuitous loan of chattel—Injury to borrower resulting from defect—Liability of lender - - - 145
See BAILMENT.

INLAND REVENUE.
See Cases under REVENUE.

INN — Rateable value — Evidence of advantageous situation and business done 667
See POOR-RATE. 2.

INSURANCE—Accident—Policy — Stamp duty —Workmen's compensation - 353
See REVENUE. 8.

INSURANCE, BURGLARY—*Burglary and Housebreaking—Loss by Theft—Entry by opening unlocked Shop Door—Breaking open Show-case—"Actual forcible and violent Entry."*

A policy of insurance on stock-in-trade recited that the assured was desirous of effecting an insurance "against loss or damage by burglary and housebreaking as hereinafter defined," and the risk insured against was expressed to be loss of the property insured "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." The insured property, which was stated in the policy to be situate on premises No. 78, Strand, was in a shop at that address, the front door of which was shut, but not locked or bolted, and access to the shop could be obtained by turning the handle of the door. In the early morning before business hours, during the temporary absence of a servant of the assured, some person opened the front door, entered the shop, and, breaking open a locked-up compartment or show-case within, which formed a portion of the shop, stole therefrom part of the insured property :—

Held (reversing the judgment of a Divisional Court, [1898] 2 Q. B. 136), that the loss which occurred as above mentioned was not covered by the policy. *In re* GEORGE AND GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION
C. A. 595

INSURANCE, GUARANTEE — *Concealment of Material Facts—Contracts in which "uberrima fides" is required.*

The doctrine that a contract of insurance is avoided by concealment of material facts on the part of the assured is not confined to contracts of marine, fire, and life insurance, but applies to all contracts of insurance.

On the application of the plaintiff, the defendants, who were underwriters at Lloyd's, underwrote an instrument in the form of a policy whereby in consideration of a premium paid by the plaintiff they guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by the plaintiff :—

Held, that concealment of material facts by the plaintiff would afford a good defence to an action on the instrument.

By Romer L.J. : A contract of guarantee may under special circumstances be one of those contracts in which uberrima fides is required on the part of the person with whom the contract is made, though ordinarily a guarantee is not one of such contracts. SEATON *v.* HEATH. SEATON *v.* BURNAND - - - - C. A. 782

INSURANCE, MARINE—*Costs—Policy—Insurance on Ship—Perils of the Seas—Consequential Damage, Underwriter's Liability for — Cost of Disposing of Cargo rendered worthless by Sea Peril.*

A ship, insured under a time policy on hull and materials, machinery and boilers, against perils of the seas and all other perils, losses, and misfortunes which might come to her hurt, detriment, or damage, was, during the currency of the policy, injured through a collision in the Thames whilst making for London, her port of destination, a hole being knocked in her bottom. Her cargo, cotton seed, through the action of the water and mud which came through the hold, became rotten, offensive, and worthless, and neither the cargo owners nor their underwriters would pay freight or take delivery. After the collision part of the cargo was put into lighters in order to allow the ship to be taken into dry dock, where she was temporarily patched. Subsequently she was towed to the Millwall Dock to discharge the rest of the cargo, and thereupon the sanitary authority of the district ordered her to abate the nuisance caused by the offensive condition of the cotton seed and to remove it. The ship accordingly was taken down the river to Dagenham Pier, and her cargo was there discharged by contractors on to land belonging to them. In an action on the policy by the shipowners to recover from their underwriter the cost of dealing with the cargo between the date of the collision and the date of its arrival at Dagenham, and also the contractors' charges for discharging and disposing of it there :—

Held, that the plaintiffs were not entitled to recover any of such costs or charges.

Judgment of Bigham J., [1898] 1 Q. B. 821, affirmed. FIELD STEAMSHIP COMPANY *v.* BURR
C. A. 579

2. —— *Reinsurance—"Subject to same terms as Original Policy"—Policies in existence at Date of Reinsurance—Policies coming into existence subsequently—Limit of Liability of Reinsurer.*

A time policy of insurance on a ship was expressed to be "a reinsurance of policy or policies" (here there was a blank space not filled in) "and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the reinsurance was effected. Subsequently, during the currency of the reinsurance policy, the two other policies

INSURANCE, GUARANTEE—*continued.*

INSURANCE, MARINE—*continued.*
came to an end, and he underwrote a fresh time policy of insurance of the same subject-matter, differing as to the valuation of the ship and in other respects from the two earlier policies. A loss occurred and was paid under the fresh policy:—
Held, that the original policies referred to in the reinsurance policy were the policies then in existence, and that the liability of the reinsurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions, and clauses as the original policies.
Judgment of Kennedy J., [1898] 1 Q. B. 739, reversed. LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION *v.* SEDGWICK - **C. A. 179**

INTERPLEADER—Bailee—Estoppel—Right to set up jus tertii - - - - **546**
See PRACTICE. 4.

JOINDER OF PARTIES—Separate causes of action—Claim for damages - **840**
See PRACTICE. 6.

JUDGE'S NOTES—Condition precedent to appeal—Question of law raised at trial—Request to make a note - - - - **501**
See COUNTY COURT. 1.

JUDGMENT DEBTOR—Bankruptcy of—Costs—Property recovered—Charging order on dividend - - - - - **863**
See SOLICITOR.

JURISDICTION—Action struck out for want of —Costs—Practice - - - - **430**
See COUNTY COURT. 2.

—— Appeal—Criminal cause or matter—Application to enforce general district rate
See PRACTICE. 2. **273**

—— County court judge—New trial—Workmen's Compensation Act - - - **805**
See EMPLOYER AND WORKMAN. 11.

—— Entry on premises—Order for—Local authority—Water-closets - - - **751**
See JUSTICES.

—— Excess of—Confirmation of new licence—Certiorari - - - - - **571**
See LICENSING ACTS. 1.

—— False pretences made in Scotland—Goods obtained in England—Debtors Act **230**
See CRIMINAL LAW. 4.

—— Justices—Outlying district of county—Transfer to other county - - - **59**
See LICENSING ACTS. 3.

—— Summary—Sum due under maintenance order—Recoverable as a civil debt **305**
See POOR LAW.

—— Summons for directions—Notice of trial—Assizes - - - - - **266**
See PRACTICE. 5.

—— Water-closets—Order for entry on premises—Local authority—Jurisdiction - **751**
See JUSTICES.

JUS TERTII—Right to set up—Interpleader—Bailee—Estoppel - - - - **546**
See PRACTICE. 4.

JUSTICES—*Jurisdiction — Order for Entry on Premises—Local Authority—Water-closets—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 36, 305.
Where an application is made under s. 305 of the Public Health Act, 1875, to a court of summary jurisdiction for an order authorizing a local authority to enter upon premises for the purpose of making a sufficient water-closet there in pursuance of the powers given by s. 36, the Court has no jurisdiction to entertain an objection by the owner of the premises that such entry is unnecessary because they are already provided with sufficient sanitary appliances. ROBINSON *v.* SUNDERLAND CORPORATION - **Div. Ct. 751**

—— Assistant overseer—Right to rate-books—Appointment - - - - **396**
See LOCAL GOVERNMENT. 1.

—— Betting — Defined place where betting carried on - - - - - **892**
See GAMING.

—— Betting—Private ground used for—"Place of public resort"—By-laws—Validity.
See MUNICIPAL CORPORATION. 1. **425**

—— Buildings—"Approved" plan—Power to dispense with observance of by-laws **444**
See LOCAL GOVERNMENT. 2.

—— "Candidate"—Nomination of disqualified person—Election—Right to petition
See MUNICIPAL CORPORATION. 2. **852**

—— Coal—Ticket in form in schedule - **449**
See WEIGHTS AND MEASURES.

—— Conscientious objection—Requiring of production of birth certificate - **577**
See VACCINATION.

—— Employment of child by parent "for purposes of gain" - - - - **1000**
See EDUCATION ACTS.

—— Engaging seamen for foreign ship—Fine—Civil debt - - - - **964**
See SHIP. 3.

—— Evidence — Misreception of — Prisoners jointly indicted—Case stated on behalf of one prisoner only - - - **490**
See CRIMINAL LAW. 1.

—— Jurisdiction—Outlying district of county—Transfer to other county - - **59**
See LICENSING ACTS. 3.

—— Licence—Confirmation of new licence—Excess of jurisdiction—Certiorari - **571**
See LICENSING ACTS. 1.

—— Maintenance order—Sum due under—Recoverable as a civil debt—Summary jurisdiction - - - - **305**
See POOR LAW.

—— Milk—Liability of innocent vendor for milk adulterated in transit - - - **20**
See ADULTERATION.

—— New street—Commencing to form street—London Buildings Acts - - - **496**
See LONDON. 3.

—— "New street"—Paving expenses - **681**
See LONDON. 4.

—— Patent agents—Registration — Validity of rules—Saving of rights acquired **406**
See PATENT. 1.

JUSTICES—*continued.*

—— Poor-rate—Distress warrant—Appeal 532
See POOR-RATE. 1.

—— Rateable value—Public-house—Evidence of advantageous situation and business done - - - - 667
See POOR-RATE. 2.

—— Rates—Exemption—Sum paid in discharge of liability to repair ratione tenuræ
See HIGHWAY. 1026

—— Seamen—Wages—Advances - 727, 735
See SHIP. 4, 6.

—— Servant—Misconduct of—Forgetfulness—Contract—Dismissal - - 901
See MASTER AND SERVANT.

—— Sewer—Drainage of group of houses by combined operation—Order of local authority — Subsequent deviation — Nuisance - - - - 972
See LONDON. 2.

—— Streets—Offences—Exposing goods for sale on carriageway—Penalty - - 1
See LONDON. 5.

—— Summary proceedings—Limitation of time—Recovery of penalties - - 4
See FISHERY. 1.

—— Vagrant Acts—Pretending to tell fortunes—Intent to deceive—Rogue and vagabond - - - - - 846
See CRIMINAL LAW. 6.

—— Water—Suffering waste—"Person supplied with water" - - - 958
See WATERWORKS.

—— Water—Supply of water to house—Owner—Expenses - - - - 377
See LOCAL GOVERNMENT. 7.

LANDLORD AND TENANT—*Compensation—Agreement as to—Tenant giving up Possession before Expiration of Term—Agricultural Holdings (England) Act*, 1883, (46 & 47 *Vict. c.* 61), *s.* 57.

A tenant of agricultural land and his landlord agreed that the land should be given up before the expiration of the term, and that the tenant should receive compensation in respect of feeding stuffs, which is an improvement comprised in the 1st schedule to the Agricultural Holdings Act, 1883, and of three other matters not mentioned in the Act. The amount to be paid was to be ascertained by two valuers appointed by the landlord and the tenant respectively. In an action by the tenant to recover the amount agreed on by the valuers:—

Held, that such an agreement between landland and tenant is not prohibited by the Agricultural Holdings Act, 1883; that the claim not being for compensation under the Act, the procedure under the Act did not apply to it; and that the plaintiff was entitled to recover in the action. NEWBY *v.* ECKERSLEY - - - **C. A. 465**

2. —— *Compensation for Improvements—Counter-notice of Claim by Landlord—Arbitration—Award to Landlord of Amount in excess of Tenant's Claim—Enforcement of Award—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 6–9, 22—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.

An outgoing tenant of a farm gave due notice of intention to claim from the lessor compensation for improvements under the Agricultural Holdings (England) Act, 1883, and the lessor gave due notice of intention to counter-claim against the tenant for breaches of covenant. After the expiration of the time for giving notices of claim prescribed by the Act, both parties gave notices of further claims, some of which were in respect of matters not within the Act. Referees and an umpire having been appointed in pursuance of the Act, before the reference proceeded, an agreement in writing was made between the parties by which all matters in difference as stated in the claims and counter-claims were referred to the referees and umpire already appointed under the Act, and it was agreed that all the said matters should be dealt with in one award only of the said referees or umpire. The referees disagreeing, the umpire made an award by which he found that a certain amount was due from the lessor to the tenant, and a larger amount was due from the tenant to the lessor, and awarded that the tenant should pay the balance to the lessor. The amount not being paid:—

Held, that leave might be given to the lessor to enforce the award in the same manner as a judgment or order to the same effect under s. 12 of the Arbitration Act, 1889. *In re* LLOYD AND TOOTH - - - - - **C. A. 559**

3. —— *Distress—Goods Impounded on Premises—Man in Possession*—11 *Geo.* 2, *c.* 19, *s.* 10.

Where goods distrained for rent by a landlord have been impounded on the premises under 11 Geo. 2, c. 19, s. 10, it is not requisite that any one on the landlord's behalf should be left in possession of the goods. JONES *v.* BIERNSTEIN **Div. Ct. 470**

4. —— *Lease—Breach of Covenant—Right of Re-entry—Covenant not to Sub-let without Landlord's Consent—Mistake—Forgetfulness—Equitable Relief against Forfeiture.*

In a lease for years the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to re-enter upon breach of any of the covenants. The lessees, without asking for the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, and to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant:—

Held, that the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, and that the plaintiffs were entitled to succeed in the action.

Barrow v. *Isaacs*, [1891] 1 Q. B. 417, followed.

LANDLORD AND TENANT—*continued.*

Hyde v. *Warden*, (1877) 3 Ex. D. 72, questioned. EASTERN TELEGRAPH COMPANY *v.* DENT **C. A. 835**

5. —— *Lease — Covenant to bear Charges—Charge upon Landlord in respect of Premises—Expenses of paving New Street—Claim by District Board—Payment by Landlord—Right to recover from Tenant—Metropolis Management Acts*, 1855, 1862 (18 & 19 *Vict. c.* 120, *ss.* 105, 250; 25 & 26 *Vict. c.* 102, *ss.* 77, 96).

By a covenant in a lease of land in the metropolis the tenant was liable to bear, pay, and discharge, charges, duties, assessments, and impositions, charged, assessed, or imposed, upon the premises, or upon the landlord in respect thereof. The lease was determinable by six months' notice. The landlords gave notice to determine it, and contracted to sell the property. The District Board of Works gave notice to the landlords of apportionment of expenses of paving a new street, under the Metropolis Management Act, 1855, s. 77, fixing no date for payment. The landlords paid the amount claimed. The work was commenced after the notice to determine the lease had expired.

In an action by the landlords to recover under the covenant the amount paid by them to the District Board:—

Held, that the words of the covenant included the expenses of paving the new street, and that, when the District Board gave notice to the landlords of the apportionment and charge, the charge became operative, and the landlords became liable to pay the amount, and were entitled to recover it from the tenant under the covenant:

Held, also, that the landlords were owners of the premises, within the meaning of the Metropolis Management Act, 1855, s. 250, until the date fixed by the contract of sale for completion.

Thompson v. *Lapworth*, (1868) L. R. 3 C. P. 149, followed. WIX *v.* RUTSON **Bruce J. 474**

6. —— *Lease—Sub-lease by Assignee — Liability of Sub-lessee — Rent reserved by original Lease—Payment by Lessee — Indemnity—Money paid.*

The lessees of premises having assigned the term, the assignee mortgaged the premises by way of sub-demise. The mortgage provided that, upon default by the mortgagor, the mortgagees might enter into possession, or receipt of the rents and profits of the premises, and demise or sell the same, and out of moneys so received by them, whether as rents and profits or purchase-money, should in the first place pay the rent reserved by the original lease. The mortgagees, having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the mortgagees to recover the amount so paid by them:—

Held, that the action was not maintainable.

Moule v. *Garrett*, (1870) L. R. 5 Ex. 132; (1872) 7 Ex. 101, distinguished. BONNER *v.* TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY - - **C. A. 161**

—— Tenant at will—Doing of repairs by landlord—Determination of will - **486**
See LIMITATIONS, STATUTE OF. 4.

LANDS CLAUSES—Minerals—Notice of intention to work—Compensation—Arbitration — Duty of company to take up award - - - - **921**
See RAILWAY. 3.

LEASE.
See Cases under LANDLORD AND TENANT.

LEASEHOLDS — Assignment — Stamp duty — Consideration—Rent - - **335**
See REVENUE. 5.

LEVEL CROSSING—Speed of trains—Evidence of injury - - - - **72**
See RAILWAY. 2.

LIABILITY—Contractor—Liability of principal for negligence of—Collateral negligence
See PRINCIPAL AND AGENT. 2. **221**

—— Corporation—Action for malicious prosecution against - - - **392**
See MALICIOUS PROSECUTION.

—— Of charterer for defective condition of ship—Breach of duty - - - **986**
See NEGLIGENCE.

—— Rates — Exemption — Liability to repair ratione tenuræ—Sum paid in discharge of liability - - - - **1026**
See HIGHWAY.

—— "Subject to same terms as original policy"—Limit of liability of reinsurer **179**
See INSURANCE, MARINE. 2.

LIBEL—Disparagement of goods—Comparison of plaintiff's goods with those of defendant—Cause of action - - **86**
See DEFAMATION. 1.

—— Privilege—Petition for order for reception of lunatic—Defamatory statement in particulars - - - - **455**
See DEFAMATION. 2.

LICENSING ACTS—*Confirmation of New Licence—Excess of Jurisdiction—Certiorari.*

The confirming authority, whose confirmation is, under the provisions of the Licensing Acts, necessary to the validity of certain classes of new licences, sit as a court, and therefore, if a licence granted to a person not qualified by law to hold it or in other respects granted without jurisdiction is confirmed by them, a writ of certiorari will lie to bring it up to be quashed.

Reg. v. *Sharman*, [1898] 1 Q. B. 578, distinguished. THE QUEEN *v.* MANCHESTER JUSTICES **Div. Ct. 571**

2. —— *Offences—Sale without Licence—House of Commons—Sale by Servant of the House—Charge against Servant—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The provisions of s. 3 of the Licensing Act, 1872, imposing penalties for unlawful sale of liquor without a licence, do not apply to a servant selling liquor, the property of his master, by his master's order.

The respondent, a servant of the House of Commons, sold liquor, the property of the House, at a bar within the precincts of the House. The purchaser of the liquor was not a member of either House of Parliament, and the place where it was sold was not licensed for the sale of liquor.

On a case stated on an information charging

LICENSING ACTS—*continued.*
the respondent with unlawfully selling liquor which he was not licensed to sell, contrary to s. 3 of the Licensing Act, 1872:—
Held, that the respondent was not guilty of an offence against the Act, and could not be convicted. WILLIAMSON *v.* NORRIS - **Div. Ct. 7**

3. —— *Transfer — Justices — Jurisdiction — Outlying District of County—Transfer to other County—County Police Act*, 1840 (3 & 4 *Vict. c.* 88), *s.* 2.
The transfer of an outlying district of a county to another county under the County Police Act, 1840, s. 2, does not effect a transfer of the licensing jurisdiction in that district to the justices of the other county. THE QUEEN *v.* WORCESTERSHIRE JUSTICES. THE QUEEN *v.* WARWICKSHIRE JUSTICES - - - **C. A. 59**

LIMITATIONS, STATUTE OF—*Practice—County Court — Special Defence — Notice — Statutes of Limitation—County Court Rules*, 1895, *Order x., rr.* 14*a*, 18*a*.
In an action in the county court, a notice of the special defence of a Statute of Limitations is sufficient if the statement in the notice follows, without any addition, form 95*a* in the Appendix to the County Court Rules, 1895, which is, "that the claim for which the defendant is summoned is barred by a Statute of Limitation," and the defendant need not specify the particular statute on which he intends to rely. EATON *v.* TAPLEY **Div. Ct. 953**

2. —— *Simple Contract Debt charged on Land —Personal Action—Period of Limitation—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.
Where an action is brought to recover a simple contract debt, and the money sought to be recovered is charged on land, the period of limitation is that imposed by the Limitation Act, 1623, and has not been enlarged to twelve years by the Real Property Limitation Act, 1874.
Judgment of Lord Russell C.J., [1898] 2 Q. B. 223, reversed.
Sutton v. *Sutton*, (1882) 22 Ch. D. 511, distinguished. BARNES *v.* GLENTON - **C. A. 885**

3. —— *Tenancy at Will — Determination — Realty—Mortgage—Creation of Fresh Tenancy—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 2, 7.
A tenancy at will is determined by a legal mortgage of the premises by the owner, and knowledge of the mortgage by the tenant at will.
After the mortgage a new tenancy at will may be created between the parties so as to cause the Statute of Limitations, 3 & 4 Will. 4, c. 27, to begin to run. JARMAN *v.* HALE - **Div. Ct. 994**

4. —— *Tenant at Will—Doing of Repairs by Landlord—Determination of Will.*
Where a person is in possession of premises as tenant at will without payment of rent, the fact that the landlord enters the premises without objection on the part of the tenant for the purpose of doing repairs does not amount to a determination of the will so as to interrupt the acquisition by the tenant of a statutory title. LYNES *v.* SNAITH - - - **Div. Ct. 486**

LIMITATIONS, STATUTE OF—*continued.*
—— Public authorities protection — Act done in pursuance of Act of Parliament—Limitation of action - - **693**
See PUBLIC AUTHORITIES.

LIQUIDATED DAMAGES—Condition not to commit breach of injunction — Condition depending on one event - - **382**
See BOND.

LIQUIDATOR—Costs of official—Right to appeal —Order to pay costs personally—Winding up of company - - - **961**
See COMPANY. 2.

LOAN—Proof—Loan to firm on terms of sharing profits — Subsequent advances — Postponement—Dissolution of firm - **810**
See BANKRUPTCY. 7.

LOCAL GOVERNMENT—*Assistant Overseer — Right to Rate-books—Appointment—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 5, *sub-s.* 1.
When the overseers of a parish have expressed their intention of collecting the rates themselves, but the parish council have by resolution appointed an assistant overseer, the Court will grant a mandamus to the overseers to deliver to the assistant overseer the rate-books and all other books in their custody as overseers, for the purpose of enabling him to perform the duties of his office.
Semble, the appointment of overseers and assistant overseers under s. 5, sub-s. 1, of the Local Government Act, 1894, is complete by election by the parish council, and no document is required beyond a minute of the appointment. THE QUEEN *v.* POWELL. *Ex parte* WILLIAMS **Div. Ct. 396**

2. —— *Buildings—"Approved" Plan—Local Authority — By-laws, Power to Dispense with Observance of.*
A local authority, empowered to make by-laws for the regulation of buildings within its jurisdiction, has no power to sanction plans in contravention of by-laws properly made.
An "approved" plan is a plan which has been lawfully approved by a local authority, and not one which has merely received their approval in fact. YABBICOM *v.* KING - **Div. Ct. 444**

3. —— *Rates—County—County Boroughs—Contribution for Special Purpose—County Rate Basis—Apportionment—Local Act—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 33—*Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 2, 3, 9—*Agricultural Rates Act*, 1896, *Orders, Art.* XVII.
By a local Act, passed in 1891, the lunatic asylums board of a county containing county boroughs were directed to raise in every year by contributions from the county and the county boroughs part of the expenses incurred by the board in the execution of their duties, and to divide the estimated amount to be raised for each year between the county and the county boroughs in proportion to their respective rateable values as ascertained under s. 33 of the Local Government Act, 1888:—
Held, that, since the Agricultural Rates Act,

LOCAL GOVERNMENT—*continued.*

1896, came into force, the board ought to divide such estimated amount between the county and the county boroughs in proportion to their respective assessable values as ascertained under that Act and the regulations of the Local Government Board made in pursuance of it, instead of in proportion to their respective rateable values as ascertained under the Local Government Act, 1888. LANCASHIRE ASYLUMS BOARD *v.* MANCHESTER CORPORATION **Div. Ct. 759**

4. —— *Sewer—Vesting in Local Authority—Sewer made by Landowner "for his own Profit"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-s.* 1.

A sewer made by the owner of a quarry for the purpose of carrying off surface water coming on to his land, and thus preventing it from entering and flooding the quarry, is not a sewer made by any person for his own profit within the meaning of s. 13, sub-s. 1, of the Public Health Act, 1875. SYKES *v.* SOWERBY URBAN DISTRICT COUNCIL - - - - - **Div. Ct. 979**

5. —— *Transfer of Part of one County to another County—Adjustment of Liabilities—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 62.

By an order made under the Local Government Act, 1888, part of the county of B. was transferred to the county of H. The portion so transferred contained no county bridges and no main roads:—

Held, that the arbitrator appointed by the Local Government Board under s. 62 had power to award to the county of B. a sum of money in respect of the loss to that county of an area which contributed to expenditure on bridges and main roads without involving the county in any corresponding outlay on its own account. *In re* BUCKINGHAMSHIRE COUNTY COUNCIL AND HERTFORDSHIRE COUNTY COUNCIL - **Div. Ct. 515**

6. —— *Transfer of Part of one Union to another Union—Adjustment of Property and Liabilities—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 68.

By an order under the Local Government Acts, 1888 and 1894, part of a township within the area of a union was detached from it and transferred to another union. On a claim by the union from which the transfer had been made for an adjustment, under s. 68 of the Local Government Act, 1894, of the property, debts, and liabilities affected by the transfer:—

Held, that any such adjustment must be made between the two unions, and not between the union from which the transfer had been made and the area transferred:

Held, also, that any consideration which bore on the question whether, and to what extent, the union from which the area had been taken had been injured financially by the change, would be properly taken into consideration in making an adjustment.

Judgment of the Queen's Bench Division, [1898] 2 Q. B. 206, affirmed. *In re* ROCHDALE UNION AND HASLINGDEN UNION - - **C. A. 540**

7. —— *Water—Supply of Water to House—Owner — Expenses — Local Authority — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 62—

LOCAL GOVERNMENT—*continued.*

Public Health (Water) Act, 1878 (41 & 42 *Vict. c.* 25), *s.* 3.

By the Public Health Act, 1875, s. 62, a local authority may, under certain conditions, require the owner of a house within their district to obtain a supply of water to his house, and in default of his compliance may themselves do the necessary work and recover the expenses from him. By the Public Health (Water) Act, 1878, s. 3, a rural sanitary authority may, where a house within their district has not within a reasonable distance from it a supply of water, and they think that such supply can be brought within a reasonable distance at a cost not exceeding certain specified limits of amount, require the owner to provide such supply within a reasonable distance of his house, and in default of his compliance may themselves execute the necessary works, and recover the cost from him:—

Held, that s. 3 of the later Act did not apply to limit the amount of the expenses which the local authority might recover against the owner in proceedings under s. 62 of the earlier Act. WEST LANCASHIRE RURAL DISTRICT COUNCIL *v.* OGILVY - - - - - **Div. Ct. 377**

—— Water-closets—Order for entry on premises —Local authority—Jurisdiction - 751
See JUSTICES.

LONDON — *Building — Dangerous Structures — Erection of Shores and Hoarding—Disturbance of Pavement — Duty to Restore Pavement after Hoarding Removed—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 106, 107.

Where the London County Council, acting under the powers conferred on them by Part IX. of the London Building Act, 1894, have, for the purpose of securing a dangerous structure, erected shores and a hoarding, and have taken up portions of the pavement to allow of the shores and the uprights of the hoarding being fixed in the ground, the duty of replacing the pavement after the shores and hoarding have been removed lies upon the owner of the premises and not upon the county council. CRISP *v.* LONDON COUNTY COUNCIL - - Wills J. 720

2. —— *Sewer—Drain—Drainage of Group of Houses by Combined Operation — Nuisance — Order of Local Authority—Subsequent Deviation —Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

In 1879 an order of the vestry was obtained under the Metropolis Local Management Act, 1855, for draining a group of eleven houses by a combined operation. It was subsequently discovered that there had been a deviation in the course of the drain from the plan signed by the surveyor, but there was no evidence that any houses other than those on the plan were drained by the combined operation:—

Held, that a mere deviation in the course of the drain was not sufficient to convert it into a sewer, and that the vestry was not therefore liable for its repair. GREATER LONDON PROPERTY COMPANY *v.* FOOT - - - **Div. Ct. 972**

3. —— *Street—New Street—Commencing to*

LONDON—*continued.*

Form Street—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 8.

A row of houses having been erected along the side of a street forming part of a building estate, the respondent erected a shop on land purchased from the freeholder of the estate on the same side of the street and fronting to it, but separated from the end house of the row by an intervening vacant space of the width of forty feet, which is the statutory width of a street intended for carriage traffic. There was a side door leading from the shop into the vacant space. At the back of the shop he also erected a stable, the only access to which for carriages and horses was along the vacant space. This space, which was the property of the freeholder of the estate, was marked on the estate plan as a proposed street, but at the time of the erection of the shop and stable it had not been in fact laid out by the freeholder as a street; and, although the respondent expected that it would be laid out as a street, there was no contract by the freeholder that it should be so laid out:—

Held, that as the respondent had no control over the soil of the vacant space, he did not by erecting the shop and stable commence to form a street within the meaning of s. 8 of the London Building Act, 1894. LONDON COUNTY COUNCIL *v.* DIXON - - - - **Div. Ct. 496**

4. —— *Streets—"New Street"—Paving Expenses—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.

A road was made through agricultural land in the year 1877, under statutory powers. The statute provided that when the road was completed it should be a public highway of the parish, and repairable in like manner as any other highway of the parish should from time to time be repairable. The road was accordingly taken over and the carriageway kept in repair by the local authority. No houses were built adjoining the road until 1890, when houses were erected on one side. In 1896 houses were erected on the other side of the road, and the local authority declared the road to be a new street, directed that it should be paved, and apportioned the estimated expense between the appellants and other frontagers. The appellants were summoned for non-payment of their contributions. The magistrate who heard the summonses found as a fact that the road became a new street for the first time after the erection of houses therein. On a case stated:—

Held, that s. 105 of the Metropolis Management Act, 1855, as amended by s. 77 of the Metropolis Management Act, 1862, had not the effect of making the road a new street on its construction in 1877; that the magistrate was justified in finding that it became a new street for the first time after the erection of houses therein; and that the local authority had power to pave it and to apportion the estimated expense between the frontagers. ALLEN *v.* FULHAM VESTRY - - - - **C. A. 681**

5. —— *Streets—Offences—Exposing Goods for Sale on Carriageway — Penalty — Metropolitan*

LONDON—*continued.*

Police Act, 1839 (2 & 3 *Vict. c.* 47), *s.* 60—*Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 *Vict. c.* 5), *s.* 1—*Police Regulations of December* 28, 1869.

Sect. 60, sub-s. 7, of the Metropolitan Police Act, 1839, renders liable to a penalty every person who exposes anything for sale upon any carriageway or footway so as to cause an annoyance or obstruction in any thoroughfare within the metropolitan police district. By police regulations made under the Metropolitan Streets Act Amendment Act, 1867, and issued on December 28, 1869, costermongers, street hawkers, itinerant traders, and their barrows, carts, and stalls, are made liable to be removed from any street and public way in which they create an obstruction to the traffic or are an annoyance to the inhabitants:—

Held, that such regulations did not impliedly repeal s. 60, sub-s. 7, of the Metropolitan Police Act, 1839, nor had they the effect of superseding the penalty imposed by that sub-section. WANDSWORTH BOARD OF WORKS *v.* PRETTY **Div. Ct. 1**

—— Public authorities protection—Act done in pursuance of Act of Parliament—Limitation of action - - - **693**
See PUBLIC AUTHORITIES.

LOTTERY — *Prize Competition — Prediction of Coming Event—Births and Deaths in London during named Week.*

The defendant published a newspaper containing an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week. Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer:—

Held, that the competition, not being one the result of which depended entirely on chance, was not a lottery. HALL *v.* COX - - **C. A. 198**

LUGGAGE—Passengers' "ordinary luggage"—Bicycle - - - - **243**
See RAILWAY. 4.

LUNACY—Petition for order for reception of lunatic—Defamatory statement in particulars—Privilege - - **455**
See DEFAMATION. 2.

MACHINERY — Compensation for injury by accident—Building not exceeding thirty feet in height - - - **374**
See EMPLOYER AND WORKMAN. 14.

—— Personal injury by accident—Ship unloading in dock—Compensation - **15**
See EMPLOYER AND WORKMAN. 2.

MAINTENANCE—Sum due under maintenance order—Recoverable as a civil debt—Summary jurisdiction - - **305**
See POOR LAW.

MALICIOUS PROSECUTION — *Corporation — Action against—Liability.*

An action for malicious prosecution will lie against a corporation.

Edwards v. *Midland Ry. Co.*, (1880) 6 Q. B. D. 287, followed. CORNFORD *v.* CARLTON BANK, LIMITED - - - - **Darling J. 392**

MANOR — Customary obligation to repair — Breach of obligation by tenant—Remedy of lord against tenant's executors 293
See COPYHOLD.

MANSLAUGHTER — Infant child — Neglect to procure medical aid—Conscientious objection to medical aid - - 283
See CRIMINAL LAW. 5.

MARINE INSURANCE - - 179, 579
See INSURANCE, MARINE. 1, 2.

MARRIED WOMAN—Trading separately from husband in firm name—Bankruptcy notice—Receiving order - - 566
See BANKRUPTCY. 1.

MASTER AND SERVANT—*Dismissal—Misconduct of Servant—Contract—Forgetfulness.*
A single instance of forgetfulness by a servant, by reason of which damage is caused to a valuable machine of which he has the care and management, may constitute such neglect of duty as to justify his master in dismissing him without notice. BASTER *v.* LONDON AND COUNTY PRINTING WORKS - - - Div. Ct. 901

—— Workmen's Compensation Act, 1897.
See Cases under EMPLOYER AND WORKMAN.

MATERIAL FACTS — Concealment — Contracts in which "uberrima fides" is required
See INSURANCE, GUARANTEE. 782

MEASURE - - - - - 449
See WEIGHTS AND MEASURES.

MEDICAL AID — Conscientious objection to — Neglect to procure medical aid—Infant child—Manslaughter - - 283
See CRIMINAL LAW. 5.

MEDICAL PRACTITIONER — "*Physician*" — *False Description—Medical Act*, 1858 (21 & 22 *Vict. c.* 90), *s.* 40—*Medical Act*, 1886 (49 & 50 *Vict. c.* 48), *s.* 6.
By s. 40 of the Medical Act, 1858, "any person who shall wilfully and falsely pretend to be and take or use the name or title of a physician . . . . or any name, title, addition or description implying that he is registered under this Act, or that he is recognised by law as a physician . . . ." is made liable to a penalty on summary conviction.
By s. 6 of the Medical Act, 1886, a registered medical practitioner is entitled to practise medicine, surgery and midwifery in the United Kingdom.
A licentiate of the Society of the Apothecaries of London under a diploma granted by that body since 1886, although duly registered as a medical practitioner under the Medical Acts and entitled to practise medicine, surgery and midwifery, is not entitled to describe himself as a physician; but such a description, though incorrect, does not subject him to the penalty imposed by s. 40 of the Medical Act, 1858, unless it be also made wilfully and falsely. HUNTER *v.* CLARE - - - - Div. Ct. 635

MERCHANT SHIPPING.
See Cases under SHIP.

METROPOLIS.
See LONDON.

MILK—Liability of innocent vendor for milk adulterated in transit - - 20
See ADULTERATION.

MINE—Notice of intention to work minerals—Compensation — Arbitration — Duty of company to take up award - 921
See RAILWAY. 3.

MISREPRESENTATION — Right of action — Person induced by misrepresentation to commit crime - - - 816
See FOREIGN ENLISTMENT.

MISTAKE—Executor—Assets paid to official receiver without retaining debt—Repayment - - - - - 905
See BANKRUPTCY. 9.

—— Notice of objection—Power of amendment
See PARLIAMENT. 2. 102

MORTGAGE—Stamp—Trust deed for securing debenture stock—Transfer of mortgage
See REVENUE. 4. 121

—— Stamp duty—Covenant—Agreement to execute mortgage - - - 361
See REVENUE. 7.

—— Tenancy at will—Creation of fresh tenancy
See LIMITATIONS, STATUTE OF. 3. 994

MUNICIPAL CORPORATION — *By-laws — Validity—Private Ground used for Betting—"Place of Public Resort"—Middlesborough Improvement Act*, 1877 (40 & 41 *Vict. c. xxx.*), *s.* 25.
The Middlesborough Improvement Act, 1877, s. 25, empowers the corporation to make "such by-laws as they may think fit for the prevention of betting . . . . in the public streets . . . . and other places of public resort within the borough."
The corporation made a by-law that "any person who shall frequent and use any street . . . . or other place of public resort within the borough . . . . for the purpose of bookmaking or betting . . . . shall be liable to a penalty."
The appellant used for the purpose of bookmaking an uninclosed piece of private ground within the borough, bounded by streets. Bookmakers and other persons habitually used the ground for betting, but without permission from the owner. The appellant and the other bookmakers conducted their business in an orderly manner, and caused no nuisance, annoyance, or obstruction. The appellant was convicted under the by-law.
On a case stated:—
Held, that the by-law was within the power given by the Act, and was valid; that, as the ground was in fact habitually used by the public, it was a "place of public resort," within the meaning of the by-law; and that the appellant was rightly convicted. KITSON *v.* ASHE
Div. Ct. 425

2. —— *Election—Right to Petition—"Candidate"—Nomination of Disqualified Person—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 77, 88.
By s. 88 of the Municipal Corporations Act, 1882, "An election petition may be presented . . . . by a person alleging himself to have been a candidate at the election."
By s. 77, "'Candidate' means a person

MUNICIPAL CORPORATION—*continued.*

elected, or having been nominated, or having declared himself a candidate for election."

The petitioner and respondent were nominated in proper form for election to the office of councillor for a ward in a borough. The petitioner at the time of his nomination was interested in a contract with the corporation of the borough. The respondent objected to the petitioner's nomination on the ground that he was, by reason of his interest in the contract, disqualified for election. The mayor allowed the objection, and the respondent, being the only other person nominated, was declared elected. It was conceded by the respondent, upon the authority of *Pritchard* v. *Mayor of Bangor*, (1888) 13 App. Cas. 241, that the mayor had no jurisdiction to entertain the objection to the petitioner's nomination, but it was contended that the petitioner had no right to present a petition:—

Held, (1.) that the petitioner was disqualified for nomination, none the less because he might by assigning his interest in the contract have got rid of his disqualification before the date of the poll; but

Held, (2.) that the petitioner, although disqualified for election and nomination, having in fact been nominated in proper form, was a "candidate" within the meaning of s. 77, and consequently entitled under s. 88 to present a petition for the purpose of questioning the election of the respondent.

Monks v. *Jackson*, (1876) 1 C. P. D. 683, distinguished. HARFORD *v.* LINSKEY **Div. Ct. 852**

3. —— *Resignation of Office—Office when vacant—Outgoing Alderman—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 36, *sub-ss.* 1 *and* 2; *s.* 60, *sub-s.* 3.

Resignation of his office by a borough alderman in the manner provided by s. 36, sub-s. 1, of the Municipal Corporations Act, 1882, will not render the office vacant until it is declared to be vacant by the borough council with the formalities prescribed by sub-s. 2; and, consequently, an alderman, who in the course of rotation is about to go out of office under s. 14, sub-ss. 6 and 7, cannot by merely resigning his office before the ordinary day of election of aldermen, and in the absence of a declaration by the council that the office is vacant, get rid of his disqualification to vote at the election of aldermen under s. 60, sub-s. 3. PEASE *v.* LOWDEN **Div. Ct. 386**

MUNICIPAL REGISTRATION—Voters.
See Cases under PARLIAMENT.

NEGLIGENCE — *Charterer — Liability of, for defective Condition of Ship—Breach of Duty.*

The defendant chartered for a single voyage a vessel which was at the time at sea and in ballast. The charterparty declared that she was in every way fit for the service, and provided that she should be so maintained by the owners. On the afternoon of April 5 the vessel was put at the defendant's disposal in dock, and two hours afterwards the loading began, the defendant having contracted with a stevedore for the purpose, who had engaged the plaintiff amongst others to carry out the work. Fifteen minutes later the plaintiff, in the course of his work, had to descend a ladder leading into the hold. It came adrift, and the plaintiff fell, sustaining injuries for which he sued the defendant:—

Held, that the defendant was liable to the plaintiff, since it was his duty under the circumstances to make some inspection of the vessel before allowing the stevedore and his men to go on board her, and since the slightest inspection would have revealed the defective state of the ladder. MARNEY *v.* SCOTT - **Bigham J. 986**

NEGLIGENCE—*continued.*

—— Contractor—Liability of principal for negligence of—Collateral negligence - **221**
See PRINCIPAL AND AGENT. 2.

—— Infant child—Conscientious objection to medical aid—Neglect to procure medical aid—Manslaughter - - **283**
See CRIMINAL LAW. 5.

NEW STREET - - - - - **496, 681**
See LONDON. 3, 4.

NEW TRIAL—Workmen's Compensation Act—Jurisdiction of county court judge **805**
See EMPLOYER AND WORKMAN. 11.

NOMINATION — By member — Revocation by subsequent will - - - **45**
See FRIENDLY SOCIETY.

—— Disqualified person—Election — Right to petition—"Candidate" - - **852**
See MUNICIPAL CORPORATION. 2.

NOTICE—Act of bankruptcy—Married woman trading separately from husband in firm name—Receiving order - - **566**
See BANKRUPTCY. 1.

—— By trustee in bankruptcy—Undischarged bankrupt — After-acquired property—Solicitor's bill of costs—Assignee for value—Priority - - - **688**
See BANKRUPTCY. 10.

—— Objection—Omission to state place of abode
See PARLIAMENT. 3. **116**

—— Objection to borough vote—Mistake—Power of amendment - - - **102**
See PARLIAMENT. 2.

—— Practice — Special defence — Statutes of Limitation—County court - **953**
See LIMITATIONS, STATUTE OF. 1.

—— Trial—Assizes—Summons for directions—Jurisdiction - - - **266**
See PRACTICE. 5.

NUISANCE—Sewer—Drainage of group of houses by combined operation — Subsequent deviation - - - - **972**
See LONDON. 2.

—— Stream—Pollution—Remedies - **27**
See RIVER.

OFFENCES—Sale without licence — House of Commons — Sale by servant of the House - - - - **7**
See LICENSING ACTS. 2.

—— Salmon Fishery Acts—Recovery of penalties —Limitation of time - - **4**
See FISHERY. 1.

OFFENCES—*continued.*

—— Streets — Exposing goods for sale on carriageway—Penalty - - 1
See LONDON. 5.

OFFENCES AGAINST THE PERSON—Infant child—Conscientious objection to medical aid—Manslaughter - - 283
See CRIMINAL LAW. 5.

OFFICE—Resignation—Office when vacant — Outgoing alderman - - 386
See MUNICIPAL CORPORATION. 3.

ORAL CONTRACT—Part payment—Statute of Frauds - - - - 401
See SALE OF GOODS. 3.

OVERSEER—Assistant overseer—Right to rate-books—Appointment - - 396
See LOCAL GOVERNMENT. 1.

PARLIAMENT — *Amendment — Description of Qualifying Property—Power to amend—Franchise —Registration—Borough Vote — Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 13.

The claimant for a borough vote entered by mistake in the fourth column of his notice of claim, as the description of qualifying property, 202, Gordon Road and 31, Monk Street. It was proved that he had occupied 202, Gordon Road and 33, Monk Street in immediate succession for the qualifying period, and the revising barrister altered 31 into 33, and allowed the claim:—

Held, that the revising barrister had power to make the amendment. KITCHEN *v.* JOHNSON
Div. Ct. 95

2. —— *Notice of Objection—Mistake—Power of Amendment—Borough Vote — Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 2—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 18—*Registration Order*, 1895.

The mistakes in notices of objection which a revising barrister is empowered to correct under s. 28 of 41 & 42 Vict. c. 26, include mistakes of law (Wills J. dissenting).

In a notice of objection to the retention of a person's name on the occupiers' list of voters in a borough, the objector described himself as "on the list of parliamentary electors and burgesses" for a certain parish in the borough, but incorrectly inserted as his place of abode his shop, which was his qualifying property, and at which, though he spent the greater part of the day there, he did not reside. His reason for so doing was that his shop was situate in the borough, and his place of abode was at some distance from the borough, and he thought he ought to give his address within the borough. No one was misled by the misstatement:—

Held, by Lord Russell of Killowen C.J. and Lawrance J. (Wills J. dissenting), that the misstatement of the place of abode was a mistake which the revising barrister had power to amend. PRESCOTT *v.* LEE - - - - **Div. Ct. 102**

3. —— *Notice of Objection—Omission to state Place of Abode—Franchise—Registration—Registration Order*, 1895, *Sched. I., Form* 5 (*a*).

Notice of objection to the name of the respondent being retained on the ownership portion of the register was sent by the appellant by post to the respondent, and was duly received by him. The appellant omitted to insert in the body of the notice the respondent's place of abode as described in the register, as required by the Registration Order, 1895, Sched. I., Form 5 (*a*), but, with the intention of saving postage, placed it on the back of the notice, where it served as the postal address of the respondent:—

Held, that the notice of objection was good, although it did not strictly follow the form prescribed by the Order. LINFORTH *v.* BUTLER
Div. Ct. 116

4. —— *Notice of Selection—Appeal from Revising Barrister — Franchise — Registration — Borough Vote—Duplicate Entries—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 14.

The appellant, whose name was on the list of voters for a borough in respect of his place of abode, duly claimed to have it also inserted on the list in respect of his place of business, and gave to the revising barrister a notice of selection in proper form, selecting the entry of his place of business as the one to be retained for voting. The revising barrister allowed the claim, but held that at the time the notice of selection was given there was no duplicate entry on the list of voters to which the notice could apply, and he accordingly marked the entry in respect of the appellant's place of abode as the entry to be retained for voting:—

Held, that the revising barrister was right, and that no appeal lay from his decision. LLOYD JONES *v.* MUNRO - - - **Div. Ct. 109**

PAROCHIAL ASSESSMENT — Public-house — Rateable value—Evidence of advantageous situation and business done **667**
See POOR-RATE. 2.

PARTICULARS — Defamatory statement in—Petition for order for reception of lunatic —Libel—Privilege - - **455**
See DEFAMATION. 2.

PARTIES — Joinder of defendants — Separate causes of action—Claim for damages
See PRACTICE. 6. **840**

PARTNERSHIP—Action against partners in firm name—Death of partner after appearance—Form of defence of surviving partner - - - - **714**
See PRACTICE. 1.

—— Proof—Loan to firm on terms of sharing profits — Subsequent advances — Postponement—Dissolution of firm - **810**
See BANKRUPTCY. 7.

PASSENGER—Luggage — "Ordinary luggage" —Bicycle - - - - **243**
See RAILWAY. 4.

PATENT—*Patent Agents—Registration—Validity of Rules—Saving of Rights Acquired—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 101, *and* 1888 (51 & 52 *Vict. c.* 50), *ss.* 1, 27—*Register of Patent Agents Rules*, 1889 *and* 1891—*Patent Rules*, 1890.

The Register of Patent Agents Rules, 1889,

PATENT—*continued.*
are valid and in force; and therefore a patent agent who has been bonâ fide in practice prior to the passing of the Patents, Designs, and Trade Marks Act, 1888, and who is consequently entitled under s. 1, sub-s. 3, of that Act to be registered as a patent agent, must pay before registration the fee prescribed by those rules.

The right which a person had prior to the passing of the Patents, Designs, and Trade Marks Act, 1888, to practise as a patent agent and describe himself as such, is not a "right acquired" which is saved from the operation of the Act by s. 27. STAREY *v.* GRAHAM **Div. Ct. 406**

2. —— *Practice—Opposition to Grant—Right to be heard in Opposition—Interest in Patent—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 11, 95—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 4.

The Patents, Designs, and Trade Marks Act, 1883, s. 11, as amended by the Patents, Designs, and Trade Marks Act, 1888, s. 4, does not confer the right to oppose the grant of a patent, on the ground that the invention has been patented in this country on an application of prior date, upon a person who has no interest in the prior patent or the patent applied for. THE QUEEN *v.* COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS - - - - **C. A. 909**

PATENT AGENTS RULES (REGISTER OF), 1889 and 1891 - - - - **406**
See PATENT. 1.

PATENT RULES, 1890 - - - **406**
See PATENT. 1.

PAVEMENT—Disturbance of—Duty to restore pavement after hoarding removed **720**
See LONDON. 1.

PAVING—"New street"—Expenses of paving **681**
See LONDON. 4.

—— Expenses of paving new street—Covenant to bear charges—Payment by landlord—Right to recover from tenant - **474**
See LANDLORD AND TENANT. 5.

PAYMENT—Oral contract — Part payment — Statute of Frauds - - - **401**
See SALE OF GOODS. 3.

PENALTY—Recovery of—Limitation of time—Justices—Summary proceedings - **4**
See FISHERY. 1.

—— Streets—Offences—Exposing goods for sale on carriageway - - - **1**
See LONDON. 5.

PETITION—Election—"Candidate"—Nomination of disqualified person - **852**
See MUNICIPAL CORPORATION. 2.

PLAN—"Approved" plan — Buildings—Power to dispense with observance of by-laws **444**
See LOCAL GOVERNMENT. 2.

POLICE—Justices—Jurisdiction—Outlying district of county — Transfer to other county - - - - **59**
See LICENSING ACTS. 3.

POLICE—*continued.*
—— Streets—Offences—Exposing goods for sale on carriageway—Penalty - - **1**
See LONDON. 5.

POLICY — Accident — Stamp duty — Workmen's compensation - - - **353**
See REVENUE. 8.

—— Insurance.
See Cases under INSURANCE.

POLLUTION—Stream—Remedies—Nuisance **27**
See RIVER.

POOR LAW — *Maintenance — Sum Due under Maintenance Order—Recoverable as a Civil Debt—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 6—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35.

Money due under an order of justices made upon a person for the maintenance of his father under 43 Eliz. c. 2, s. 6, is recoverable before a court of summary jurisdiction as a civil debt and not as a penalty; and an order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress, unless it be proved that the person in default has since the date of the latter order had the means to pay the sum in respect of which he has made default. *In re* GAMBLE - - - **Div. Ct. 305**

POOR-RATE—*Distress Warrant—Appeal—Poor Law.*

An appeal will not lie against the issue of a distress warrant for poor-rate before the distress has been levied. THE QUEEN *v.* LONDON JUSTICES - - - - **Div. Ct. 532**

2. —— *Rateable Value — Public-house — Evidence of Advantageous Situation and Business done—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

On an appeal by the occupier against an assessment of a public-house to a poor-rate, an arbitrator, to whom the case was referred, and whose award was to be published in the form of a special case, found that the rents actually paid for other public-houses in the district furnished no criterion of the rent which would be paid for the appellant's house. He rejected evidence, which the respondents desired to give, by cross-examination of the appellant, of the amount of the weekly takings, but he admitted evidence as to the largeness of the business actually done, and as to the advantageous situation of the house for carrying on business:—

Held, affirming the judgment of the Divisional Court, that, the ordinary method of arriving at a valuation by comparison with the market value of other public-houses not being available, the method of arriving at the valuation of this house adopted by the arbitrator was correct.

Dodds v. *South Shields Union*, [1895] 2 Q. B. 133, distinguished. CARTWRIGHT *v.* SCULCOATES UNION - - - - - **C. A. 667**

POUNDAGE—Receiving order—Sheriff—Execution—Sale - - - - **460**
See BANKRUPTCY. 8.

PRACTICE — *Action against Partners in Firm Name—Death of Partner after Appearance — Defence of Surviving Partner—Form of Defence.*

An action was brought against a firm in the

PRACTICE—*continued.*

firm name. There were two partners, one of whom died after writ and appearance. The surviving partner put in a defence not purporting to be the defence of the firm, but as his personal defence to the action:—

Held, that the form of the defence was wrong, as the defendant, not being sued in his personal capacity, was not entitled to put in a personal defence, but only a statement of defence for and in the name of the firm. ELLIS *v.* WADESON.
C. A. 714

2. —— *Appeal — Jurisdiction of Court of Appeal—Criminal Cause or Matter—Application to enforce General District Rate — Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Local Government—Rates—District Rate—"Land covered with Water"—Artificial Reservoir—Proportionate Rating—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

An application to a court of summary jurisdiction for an order to enforce payment of a general district rate under the Public Health Act, 1875, s. 256, is not a criminal cause or matter, and therefore an appeal lies to the Court of Appeal from the judgment of a Divisional Court upon a case stated on such an application.

An artificial reservoir constructed by a waterworks company for the purpose of storing water is "land covered with water," within the meaning of s. 211 of the Public Health Act, 1875, and is therefore rateable to general district rates in the proportion of one-fourth part only of the net annual value thereof. SOUTHWARK AND VAUXHALL WATER COMPANY *v.* HAMPTON URBAN DISTRICT COUNCIL - - - C. A. 273

3. —— *Appeal from Order of Judge at Chambers—Prohibition to Judge of County Court —"Practice and Procedure"—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

An application to a judge at chambers for a prohibition to restrain an inferior Court from exceeding its jurisdiction is not a matter of practice or procedure within the meaning of s. 1, sub-s. 4, of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal lies to the Divisional Court and not, in the first instance, to the Court of Appeal. WATSON *v.* PETTS
C. A. 54

4. —— *Interpleader — Bailee — Estoppel — Right to set up Jus Tertii—Rules of Supreme Court, Order* LVII., *rr.* 1, 2.

Where wharfingers, with whom goods were stored, had written a letter to a bank, stating that they held the goods to the bank's order, on the faith of which statement the bank advanced money on the goods, and subsequently that bank and another bank claimed the goods adversely to one another:—

Held, on an application by the wharfingers for relief by way of interpleader, that, assuming the before-mentioned letter to constitute an estoppel, nevertheless an interpleader order might be made restraining the claimants from proceeding against the wharfingers in respect of their claims except in respect of any claim which the first-mentioned bank might have upon the letter, and directing the trial of an issue between the two banks on the question to which of them the goods belonged.

Attenborough v. *St. Katharine's Dock Co.*, (1878) 3 C. P. D. 450, dicta in, followed.

Ex parte MERSEY DOCKS AND HARBOUR BOARD
C. A. 546

5. —— *Notice of Trial—Assizes—Summons for Directions—Jurisdiction—Rules of Supreme Court, Order* XXX., *rr.* 1, 2—*Order* XXXVI., *rr.* 14, 18, 18*a*.

Upon a summons for directions under Order XXX., r. 1, in an action to be tried at assizes, a judge has jurisdiction, although the defendant has not done anything to render himself liable to have terms imposed upon him as to notice of trial, to order that the defendant shall take notice of trial at a period less than ten days before the commission day, and that the case shall not come on for trial at the assizes until a day which will make the notice so given a ten days' notice of trial.

Laskier v. *Tekian*, (1892) 67 L. T. 121, distinguished. BAXTER *v.* HOLDSWORTH
C. A. 266

6. —— *Parties — Joinder of Defendants — Separate Cause of Action—Claim for Damages—Rules of Supreme Court, Order* XVI., *rr.* 4, 5, 7.

The plaintiffs brought an action against the defendants for negligently excavating near the plaintiffs' house, and thereby damaging it. The defendants in their defence denied liability, and attributed the damage wholly or in part to the negligence of a water company in leaving their water-main insufficiently stopped. On an application by the plaintiffs to add the water company as defendants:—

Held, that the causes of action against the defendants and the water company being in respect of separate torts, though the resulting damage might be the same in each case, the water company could not be joined as defendants. THOMPSON *v.* LONDON COUNTY COUNCIL C. A. 840

7. —— *Receiver — Notice of Application — Defendant not Appearing — Service — Rules of Supreme Court, Order* LXVII., *r.* 4.

Where a defendant has not appeared, and an application is made for the appointment of a receiver, it is not sufficient to file the summons at the central office, but it must be served on the defendant, or leave must be obtained for substituted service. TILLING, LIMITED *v.* BLYTHE
C. A. 557

8. —— *Security for Costs of Appeal—Appeal under Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37)—*Rules of Supreme Court, Order* LVIII., *r.* 15.

The ordinary rule of practice of the Court of Appeal as to ordering security for the costs of an appeal is applicable to appeals under the Workmen's Compensation Act, 1897. HALL *v.* SNOWDON, HUBBARD & CO. - - - C. A. 593

—— Costs—Action struck out for want of jurisdiction - - - - - 430
See COUNTY COURT. 2.

PRACTICE—*continued.*

—— New trial—Workmen's Compensation Act—Jurisdiction of county court judge 805
See EMPLOYER AND WORKMAN. 11.

—— Special defence — Notice — Statutes of Limitation—County court - 953
See LIMITATIONS, STATUTE OF. 1.

PREVENTION OF CRUELTY TO CHILDREN—Conscientious objection to medical aid—Neglect to procure medical aid—Manslaughter - - - - 283
See CRIMINAL LAW. 5.

PRINCIPAL AND AGENT—*Agreement by Agent with Third Party to Detriment of Principal—Surreptitious Dealing with other Principal—Bribe accepted by Agent—Avoidance of Contract.*

The defendant agreed to purchase a pair of horses from the plaintiff, provided they were passed as sound by a veterinary surgeon who was employed by the defendant to examine them. The horses were certified as sound by the veterinary surgeon, and the defendant sent a cheque for the price. The horses were delivered and found to be unsound, and thereupon they were returned and the cheque stopped. In the course of the trial of an action on the cheque it was elicited that the veterinary surgeon had accepted a bribe from the plaintiff:—

Held, that it was immaterial to inquire what effect the bribe had on the mind of the defendant's agent, that the offer and acceptance invalidated the certificate, and that the plaintiff could not recover under the contract which depended on the validity of the certificate. SHIPWAY *v.* BROADWOOD - - - - C. A. 369

2. —— *Independent Contractor—Liability of Principal for Negligence of — Collateral Negligence.*

The defendants were lawfully engaged in laying some telephone wires under the pavement of a street. The wires were threaded through tubes, each of which was fitted into the socket of the one next to it. To do the work of connecting these tubes at the joints with lead and solder the defendants employed an independent contractor. In order to execute the work of connection it was necessary to obtain a flare from a benzoline blow-lamp, which flare could not be obtained without the application of heat to the lamp. A servant of the contractor was using for this purpose a lamp which he ought to have known was defective by reason of its safety-valve being out of order. Wishing to heat the lamp quickly to obtain the necessary flare, he negligently dipped it into a pot of molten solder; whereupon, in consequence of the defect in the safety-valve, it exploded and injured the plaintiff who was passing by:—

Held, that the defendants were not liable, on the ground that the negligence of the contractor's servant was collateral to the execution of the work which the contractor was employed by them to do. HOLLIDAY *v.* NATIONAL TELEPHONE COMPANY - - - - Div. Ct. 221

PRINCIPAL AND SURETY — *Co-Sureties — Giving Time to Debtor—Contribution.*

The plaintiffs and the defendant, who were directors of a company, gave their joint and several bond for the purpose of guaranteeing repayment of a loan which the company raised upon mortgage of its premises, and it was provided by the bond that, although as between the company and the obligors, the latter were only sureties for the company, nevertheless, as between the obligors and the obligees (the lenders of the money), the former should be taken to be principal debtors, so that they should not nor should either of them be released from their or his liability by reason of time being given to the company or their assigns, or by any other forbearance, act, or omission of the obligees or their assigns, or by any other matter or thing whereby the obligors, or either of them, would be so released but for this provision. The plaintiffs having had to pay the amount secured by the bond, the mortgage was transferred and the bond assigned to them; and they brought an action against the defendant for contribution and as assignees of the bond to recover a third part of the amount which they had paid. The plaintiffs having, without the defendant's assent, entered into an agreement with a new company, who became the purchasers of the goodwill, premises, and stock-in-trade of the first-mentioned company, that they would not for a certain period of time enforce the mortgage against the new company:—

Held, that, having regard to the provisions of the bond, this agreement did not afford a defence to the action brought by the plaintiffs against the defendant.

Query, whether an agreement by a surety to give time to the principal debtor discharges a co-surety. GREENWOOD *v.* FRANCIS C. A. 312

PRIORITY — Undischarged bankrupt — After-acquired property — Solicitor's bill of costs—Assignee for value—Notice by trustee - - - - 688
See BANKRUPTCY. 10.

PRIVILEGE—Petition for order for reception of lunatic—Defamatory statement in particulars—Libel - - - - 455
See DEFAMATION. 2.

PRIZE COMPETITION—Prediction of coming event—Births and deaths in London during named week - - 198
See LOTTERY.

PROBATE—Res judicata—Will—Validity—Probate action—Citation of parties - 746
See ESTOPPEL.

PROHIBITION—County court judge—Appeal—Practice and procedure - - 54
See PRACTICE. 3.

PROOF—Corporation—Dissolution—Right of the Crown—Bona vacantia - - 325
See BANKRUPTCY. 6.

—— Loan to firm on terms of sharing profits—Subsequent advances — Postponement—Dissolution of firm - - 810
See BANKRUPTCY. 7.

PROSECUTION—Malicious—Action against corporation—Liability - - 392
See MALICIOUS PROSECUTION.

PUBLIC AUTHORITIES—*Act done in Pursuance of Act of Parliament—Limitation of Action—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 4.

By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, "Where . . . . any action . . . . is commenced . . . . against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority . . . . the action . . . . shall not lie, ... unless it is commenced within six months next after the act . . . . complained of."

A sanitary authority served notices, under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, on the owner of premises, requiring him to do certain specified works in respect of what was supposed to be a drain. He complied with the notices, and incurred expense in doing the works. It was discovered that the supposed drain was a sewer, which the sanitary authority was liable to repair, and the executors of the owner brought an action against the sanitary authority, to recover the amount of the expenses incurred, as money paid to the use, and at the request, of the defendants. The action was not commenced within six months after the expenses had been paid:—

Held, that the action was brought for an act done in pursuance, or execution, or intended execution, of the Public Health (London) Act, 1891, within the meaning of the Public Authorities Protection Act, 1893, s. 1, and ought to have been brought within six months, and therefore the defendants were not liable.

Waterhouse v. *Keen*, (1825) 4 B. & C. 200, and *Midland Ry. Co.* v. *Withington Local Board*, (1883) 11 Q. B. D. 788, followed. CREE *v.* ST. PANCRAS VESTRY - - - **Bruce J. 693**

PUBLIC BODY—Infringement of statute—Injunction—Evidence of injury—Speed of train - - - - - **72**
See RAILWAY. 2.

PUBLIC HEALTH—"Land covered with water"—Artificial reservoir—Proportionate rating - - - - **273**
See PRACTICE. 2.

—— Sewer made by landowner "for his own profit"—Vesting in local authority **979**
See LOCAL GOVERNMENT. 4.

—— Supply of water to house—Owner—Expenses - - - - **377**
See LOCAL GOVERNMENT. 7.

—— Water-closets—Order for entry on premises—Local authority—Jurisdiction - **751**
See JUSTICES.

PUBLIC HEALTH (LONDON)—Act done in pursuance of Act of Parliament—Limitation of action - - - - **693**
See PUBLIC AUTHORITIES.

PUBLIC-HOUSE—Rateable value—Evidence of advantageous situation and business done - - - - - **667**
See POOR-RATE. 2.

RAILWAY—*Contract of Carriage—Delay—Owner's Risk Note—Construction.*

The plaintiff delivered to the defendants, a railway company, goods to be carried to their destination viâ a particular route, upon the terms that the plaintiff, in consideration of his being charged a reduced rate below the defendants' ordinary rate, relieved the defendants "from all liability for (inter alia) delay . . . . except upon proof that such . . . . delay . . . . arose from wilful misconduct on the part of the servants of the company." The defendants by mistake forwarded the goods by a different route from that contracted for, in consequence whereof the arrival at their destination was delayed and the plaintiff suffered damage:—

Held, that as the delay of the goods was not a delay in the performance by the defendants of their contract, they were not relieved from responsibility. MALLET *v.* GREAT EASTERN RAILWAY COMPANY - - - **Div. Ct. 309**

2. —— *Level Crossing—Speed of Trains—Public Body—Infringement of Statute—Information by Attorney-General—Injunction—Evidence of Injury—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 48.

Upon an information filed by the Attorney-General to restrain a public body from exercising statutory powers in such a manner as to infringe an Act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of.

By the Railways Clauses Consolidation Act, 1845, s. 48, "Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour." A railway company had power, by a statute incorporating this clause, to cross a road, to which the clause applied, on the level. They constantly drove their trains over the level crossing at a speed exceeding four miles an hour.

On an information, filed by the Attorney-General, on the relation of the county council in whom the road was vested, for an injunction to restrain the company from allowing their trains to cross the level crossing at a speed greater than four miles an hour:—

Held, that as the information was filed to enforce the express terms of an Act of Parliament, an injunction must be granted, although there was no evidence of any injury to the public.

Attorney-General v. *Great Western Railway*, (1872) L. R. 7 Ch. 767, *Attorney-General* v. *Cockermouth Local Board*, (1874) L. R. 18 Eq. 172, and *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*, (1882) 21 Ch. D. 752, approved and followed. ATTORNEY-GENERAL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY **Bruce J. 72**

3. —— *Minerals—Notice of Intention to Work—Compensation—Repeal of prior Act—Reservation of Rights—Arbitration—Duty of Company to take up Award—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 35—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

RAILWAY—*continued.*

By a special Act a number of railway companies were dissolved and consolidated into a new company, and the Acts relating to the dissolved companies were repealed. The special Act incorporated the Railways Clauses Consolidation Act, 1845, which was to apply to the new company as if the railways made under the repealed Acts had been made under the powers and provisions of the Railways Clauses Consolidation Act, 1845, and as if that Act had been expressly made applicable to those railways, and as if those railways had been authorized to be made under the special Act. There was a proviso that the repeal should not prejudice or affect anything done under the repealed Acts, or, except as in the repealing Act specially provided, affect the rights of any persons, under the repealed Acts, to which but for the repeal they would have been entitled.

Owners of minerals, lying under and near a part of the railway which had belonged to one of the dissolved companies, gave notice of their desire to work those minerals. An arbitration was held under s. 35 of the Lands Clauses Consolidation Act, 1845, to assess the amount of compensation to be paid to the owners of the minerals. The company attended the arbitration under protest, and contended that, by virtue of the proviso in their Act, the assessment should be made under the Act of the dissolved company, and not under the Railways Clauses Consolidation Act, 1845. The arbitrator made his award, which the company refused to take up. On a rule for a mandamus to the company to take up the award:—

Held, by A. L. Smith and Romer L.JJ., Collins L.J. dissenting, that the effect of the special Act was to substitute the clauses relating to minerals of the Railways Clauses Consolidation Act, 1845, for those contained in the repealed Act, and that therefore the assessment was rightly made under the Railways Clauses Consolidation Act, 1845, and not under the repealed Act.

North Eastern Railway v. *Crosland*, (1863) 32 L. J. (Ch.) 353, distinguished.

Held, also, by A. L. Smith L.J., that the question whether the assessment of the amount of compensation to be paid to the owners of the minerals should have been made under the Railways Clauses Consolidation Act, 1845, or under the repealed Act, could not be entertained upon shewing cause against the rule nisi to the company to take up the award.

Held, by Collins L.J., that it was an answer to an application for a mandamus that the umpire had assessed compensation under the wrong Act. THE QUEEN v. LONDON AND NORTH WESTERN RAILWAY COMPANY - - - C. A. 921

4. —— *Passengers' Luggage — "Ordinary Luggage"—Bicycle.*

A bicycle is not "ordinary luggage," within the meaning of a Railway Act, by which every passenger travelling in a carriage of a certain class may take with him his ordinary luggage, not exceeding a certain weight, free of charge; and therefore a passenger by train, without luggage, is not entitled to take with him, free of charge, a bicycle, not packed up, and of less weight than the weight of luggage allowed to be carried free of charge by the class in which he is travelling. BRITTEN *v.* GREAT NORTHERN RAILWAY COMPANY - - Channell J. 243

RATE—Appeal—Jurisdiction—Criminal cause or matter—Application to enforce general district rate - - - - 273
See PRACTICE. 2.

—— Contribution for special purpose—County rate basis—Apportionment - 759
See LOCAL GOVERNMENT. 3.

—— Poor-rate - - - 532, 667
See POOR-RATE. 1, 2.

RATE-BOOKS—Right to—Assistant overseer—Appointment - - - 396
See LOCAL GOVERNMENT. 1.

RATEABLE VALUE—Public-house — Evidence of advantageous situation and business done - - - - - 667
See POOR-RATE. 2.

RATES—Exemption—Liability to repair ratione tenuræ — Sum paid in discharge of liability - - - - 1026
See HIGHWAY.

—— Poor-rate—Distress warrant—Appeal 532
See POOR-RATE. 1.

REAL PROPERTY LIMITATION—Simple contract debt charged on land—Period of limitation - - - - 885
See LIMITATIONS, STATUTE OF. 2.

—— Tenancy at will—Determination—Mortgage—Creation of fresh tenancy - 994
See LIMITATIONS, STATUTE OF. 3.

RECEIVER—Notice of application—Defendant not appearing—Service - - 557
See PRACTICE. 7.

RECEIVING ORDER—Married woman trading separately from husband in firm name—Bankruptcy notice - - - 566
See BANKRUPTCY. 1.

—— Sheriff—Execution—Sale—Poundage 460
See BANKRUPTCY. 8.

REDEMPTION—Stamp duty — Debenture—Redemption on contingency—"Marketable security" - - - - 345
See REVENUE. 6.

RE-ENTRY—Right of—Breach of covenant — Forgetfulness by tenant—Equitable relief against forfeiture - - 835
See LANDLORD AND TENANT. 4.

REGISTRATION—Patent agents — Validity of rules—Saving of rights acquired 406
See PATENT. 1.

—— Voters.
See Cases under PARLIAMENT.

REGISTRATION ORDER, 1895 - - 102
See PARLIAMENT. 2.

—— Sched. I., Form 5 (*a*) - - - 116
See PARLIAMENT. 3.

RE-INSURANCE — "Subject to same terms as original policy"—Limit of liability of reinsurer - - - - 179
See INSURANCE, MARINE. 2.

RELIEF—Against forfeiture — Forgetfulness—Breach of covenant—Right of re-entry
See LANDLORD AND TENANT. 4. 835

REMITTED ACTION—Costs — Judgment under Order XIV. for part of claim—Recovery in county court of residue - 507
See COUNTY COURT. 3.

RENT—Assignment of leaseholds—Consideration—Stamp duty - - - - 335
See REVENUE. 5.

—— Payment by lessee—Indemnity—Liability of sub-lessee - - - 161
See LANDLORD AND TENANT. 6.

"REPAIRS"—Building repaired by means of a scaffolding—Compensation 1009, 1018
See EMPLOYER AND WORKMAN. 9, 13.

—— Copyholds—Breach of obligation by tenant — Remedy of lord against tenant's executors - - - - 293
See COPYHOLD.

—— Liability to repair ratione tenuræ—Rates—Exemption - - - - 1026
See HIGHWAY.

—— Tenant at will—Doing of repairs by landlord—Determination of will - 486
See LIMITATIONS, STATUTE OF. 4.

REPAYMENT — Mistake — Executor — Assets paid to official receiver without retaining debt - - - - - 905
See BANKRUPTCY. 9.

RES JUDICATA—Will—Validity—Probate action—Citation of parties - - 746
See ESTOPPEL.

RESERVOIR—"Land covered with water"—Proportionate rating - - 273
See PRACTICE. 2.

RESIGNATION—Outgoing alderman—Resignation of office—Office when vacant 386
See MUNICIPAL CORPORATION. 3.

RETAINER—Executor—Assets paid to official receiver without retaining debt—Mistake—Repayment - - - 905
See BANKRUPTCY. 9.

REVENUE—*Income Tax—Profits of Trade—Deduction for Depreciation of Machinery or Plant—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 12.

The Commissioners of Income Tax, when estimating the deduction to be allowed from the profits of a trade under s. 12 of the Customs and Inland Revenue Act, 1878, "as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern," are not bound to take an average of the depreciations during the three preceding years, but may adopt as their estimate the amount of the depreciation during the year immediately preceding that of assessment. CUNARD STEAM SHIP COMPANY *v.* COULSON Div. Ct. 865

2. —— *Income Tax—Property of Bodies Corporate or Unincorporate—Exemption—Property Legally Appropriated for the Promotion of Science—Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11, *sub-s.* 3.

By s. 11 of the Customs and Inland Revenue Act, 1885, a duty is imposed upon the annual value, income, or profits of property belonging to any body, corporate or unincorporate, subject to an exemption in favour of property which, or the income or profits whereof, shall be legally appropriated and applied for the promotion of education, literature, science, or the fine arts.

The Royal College of Surgeons of England, incorporated by charter, had two main objects: the promotion of the science of surgery, and the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising surgery as a profession, and the examination of students and others to qualify for practice or honours in surgery and kindred subjects. On an appeal against an assessment to duty under the Customs and Inland Revenue Act, 1885:—

Held, that, as the promotion of the interests of those practising surgery as a profession was in itself a main object, and one in respect of which no exemption could be claimed, the only exemption that could be claimed under s. 11 of the Act was in respect of property or income so appropriated as to create a legal obligation to apply it to the promotion of the science of surgery. *In re* ROYAL COLLEGE OF SURGEONS OF ENGLAND C. A. 871

3. —— *Stamp—Agreement for Hire of Chattel in consideration of Yearly Payment—"Bond, Covenant, or Instrument of any kind whatsoever"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By an agreement in writing not under seal it was agreed between a telephone company and one R. that the latter should pay to the company the sum of 12*l.* per annum in advance for the hire of a private wire between his premises and the company's local exchange system, and the telephonic apparatus relating thereto, and that either the company or the lessee might put an end to the agreement by giving three calendar months' notice in writing expiring on the day previous to the rent being due in any year, and the company agreed to erect and maintain in working order the said wire and telephonic apparatus:—

Held, that the agreement was chargeable with an ad valorem duty of 7*s.* 6*d.*, under clause 1 of the heading, "Bond, Covenant, or Instrument of any kind whatsoever," in the 1st schedule to the Stamp Act, 1891, and not merely with a stamp duty of 6*d.* as an agreement.

Jones v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484, followed.

Thames Conservators v. *Inland Revenue Commissioners*, (1886) 18 Q. B. D. 279, commented upon. NATIONAL TELEPHONE COMPANY *v.* INLAND REVENUE COMMISSIONERS - - C. A. 250

4. —— *Stamp—Mortgage—Trust Deed for securing Debenture Stock—Transfer of Mortgage—Additional or Substituted Security—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-s.* 1; *s.* 87, *sub-s.* 3; *s.* 88, *sub-s.* 1; *Sched. I.*

A limited company issued in 1892 500,000*l.* 4 per cent. debenture stock, secured by a trust deed duly stamped, by which freehold and leasehold property of the company were conveyed to

REVENUE—*continued.*

trustees to secure payment of the amount of the stock and interest as provided for by the deed. By a subsequent trust deed for securing debenture stock made in 1897, the trustees of which were the same as those of the deed of 1892, after reciting that the 500,000*l.* debenture stock was still outstanding and that the company were intending to issue further irredeemable 3½ per cent. debenture stock, it was provided that the amount of stock to be issued was limited in the first instance to 300,000*l.*, the company acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at 3½ per cent. per annum; that the company should be at liberty to issue further irredeemable 3½ per cent. debenture stock not exceeding 540,000*l.*, making a total of 840,000*l.* but only for the purpose of redeeming or paying off the 500,000*l.* 4 per cent. stock at the rate of not more than 108*l.* of the new stock for every 100*l.* of the stock redeemed or paid off; and that before issuing any of the further debenture stock the company should execute and deliver to the trustees an acknowledgment of indebtedness for the amount of the further proposed issue, and the trustees were to certify on the trust deed that the company were entitled to make the issue. The stock was to be issued to such persons and either at par, or at a discount, or at a premium as the company might determine. By the deed the company were, as and when the stock ought to be paid off in accordance with the deed, to pay off the same accordingly; and it was provided that in such case the stock should be paid off at par, except in the case of a voluntary winding-up when the full value of the stock was to be paid, but in any case not less than par. The freehold and leasehold properties of the company were conveyed by the deed to the trustees by way of mortgage as a security for the payment off of the stock as above mentioned. It was further provided that in the event (among other things) of the company making default in payment of the interest on the stock or performance of any of the obligations imposed upon them by the deed, or of the winding up of the company, the security should become enforceable. Upon proof to the satisfaction of the trustees that all the stock had been paid off, the trustees were to reconvey the mortgaged property to the company. The deed also provided for the transfer on payment off of the 4 per cent. debenture stock of the securities for the same to the trustees of the deed of 1897:—

Held, that in respect of the 540,000*l.*, as well as the 300,000*l.*, the deed of 1897 was chargeable with the ad valorem duty specified in the 1st schedule to the Stamp Act, 1891, under the heading "Mortgage, Bond, Debenture, Covenant," and, not being an "additional" or "substituted" security within the meaning of those words in the schedule, it was chargeable with the full duty of 2*s.* 6*d.* per cent.

By A. L. Smith L.J.: The deed of 1897 was a "mortgage" within the definition contained in s. 86, sub-s. 1, of the Stamp Act, 1891.

By Rigby L.J.: *Semble*, the deed was not a "mortgage" within that definition, but it was chargeable as a security for the payment of

REVENUE—*continued.*

money in the nature of a debenture under s. 88, sub-s. 1, of the Act. CITY OF LONDON BREWERY COMPANY *v.* INLAND REVENUE COMMISSIONERS **C. A. 121**

5. —— *Stamp Duty*—"*Conveyance or Transfer on Sale*"—*Assignment of Leaseholds*—*Consideration*—*Rent*—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 57, *Sched. I.*

The lessee, for a term of ninety-nine years at a yearly rent, of a piece of land with three houses thereon, assigned and conveyed two of the houses, in consideration of 503*l.*, for the residue of the term subject to an apportioned rent representing two-thirds of the rent reserved by the lease. By the deed of assignment the assignee covenanted to pay such apportioned rent, and to keep the assignor indemnified in respect of it, and the assignor covenanted to pay the remaining one-third of the rent reserved by the lease, and to keep the assignee indemnified in respect of it. The three houses were of the same annual value:—

Held, that, for the purpose of fixing the ad valorem duty chargeable under the heading "Conveyance or Transfer on Sale of any Property" in Sched. I. of the Stamp Act, 1891, the payment of rent by the assignee was not part of the consideration for the assignment, and that duty was chargeable upon the 503*l.* only. SWAYNE *v.* INLAND REVENUE COMMISSIONERS **Div. Ct. 335**

6. —— *Stamp Duty—Company—Debenture—Redemption on Contingency*—"*Marketable Security*"—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

A limited company issued a series of debentures for 100*l.* each, redeemable by annual drawings on and after July 1, 1902, and each debenture contained a stipulation that the company might, at any time after July 1, 1900, on giving six months' previous notice in writing to the registered holder, redeem the debenture at 103*l.*, which sum, at the expiration of such six months, should become payable as if the same were the amount of the principal moneys thereby secured:—

Held, that the ad valorem stamp duty chargeable under the head of "Marketable Security" in the 1st schedule to the Stamp Act, 1891, was chargeable upon 103*l.*, as being the "money secured" by the debenture within the meaning of the schedule. KNIGHTS DEEP, LIMITED *v.* INLAND REVENUE COMMISSIONERS **Div. Ct. 345**

7. —— *Stamp Duty—Mortgage—Covenant—Agreement to execute Mortgage—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *Sched. I.*

A limited company, by deed, in consideration of 373,000*l.* then advanced to them by a building society, agreed to execute, whenever called upon by the society, a mortgage or charge, in such form as the society should request, of all the company's interest in certain hereditaments to secure the repayment of the sum advanced, with interest. A receiver was appointed by the deed to receive the rents and profits so long as any money remained due to the society; but there was a provision that he was not to enter into possession of such rents

REVENUE—*continued.*
and profits until default should be made in payment of the principal and interest:—
Held, that this instrument was chargeable with ad valorem stamp duty under the head "Mortgage, Bond, Debenture, Covenant," in the 1st schedule to the Stamp Act, 1891. UNITED REALIZATION COMPANY *v.* INLAND REVENUE COMMISSIONERS - - - - **Div. Ct. 361**

8. —— *Stamp Duty—Policy of Insurance against Accident—Employer's Liability—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 98, *Sched. I.—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37).

An insurance company by a policy granted to employers of labour agreed to pay, for and on behalf of the employers, such sums as they should become liable to pay under the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1897, or by the common law, in respect of personal injury to any workmen in their employ:—
Held, that this instrument was not "a policy of insurance against accident" within the meaning of s. 98 and Sched. I. of the Stamp Act, 1891, and therefore was not chargeable with the duty imposed by the Act in respect of such policies. LANCASHIRE INSURANCE COMPANY *v.* INLAND REVENUE COMMISSIONERS. VULCAN BOILER AND GENERAL INSURANCE COMPANY *v.* INLAND REVENUE COMMISSIONERS **Div. Ct. 353**

REVOCATION—Nomination by member—Revocation by subsequent will - **45**
See FRIENDLY SOCIETY.

RIVER — *Pollution — Stream — "Putrid Solid Matter"—Nuisance—Remedies—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.

Sect. 2 of the Rivers Pollution Prevention Act, 1876, prohibits the putting, or causing or knowingly permitting to be put, "any putrid solid matter" into any stream so as to pollute its waters, and by s. 20 "'solid matter' shall not include particles of matter in suspension in water." By s. 17 the Act "shall not apply to or affect the lawful exercise of any right of impounding or diverting water."
The defendant owned weaving sheds, worked by steam-power, on the bank of a stream, and he had for many years prior to the passing of the Act lawfully exercised the right of impounding and diverting water from the stream for the purposes of his business. Such water was diverted from the stream through a goit and impounded in the defendant's reservoir, and contained substances discharged into the stream from paper manufactories, not belonging to the defendant, higher up the river. Whilst the water was so impounded those substances sank to the bottom and became putrescent in the form of sludge. Part of the water, when thus cleared, was taken from the reservoir and used for condensing purposes. Once a week the reservoir was cleaned by opening sluice-gates into the river and allowing the water to flow through the reservoir and out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water as it went into the stream through the sluice-gates

RIVER—*continued.*
contained 97·6 per cent. of water and 2·4 per cent. of solid matter:—
Held, that the solid matter, when it entered the stream from the reservoir, was "solid matter in suspension in water" within s. 20, and therefore not "solid matter" within the meaning of s. 2 of the Act:
Held also that, assuming that what was put into the stream was "solid matter" within the meaning of s. 2, the defendant was protected by s. 17, and therefore not liable to be proceeded against under the Act. RIVER RIBBLE JOINT COMMITTEE *v.* HALLIWELL. THE SAME *v.* SHORROCK **Div. Ct. 27**

RULES OF SUPREME COURT, Order XIV. (Judgment on Writ specially indorsed)
See COUNTY COURT. 3. **507**
—— —— **r. 1** - - - - - **382**
See BOND.
—— **Order XVI., rr. 4, 5, 7** (Parties) - **840**
See PRACTICE. 6.
—— **Order XXV., rr. 2, 4** (Proceedings in lieu of Demurrer) - - - - - **86**
See DEFAMATION. 1.
—— **Order XXX., rr. 1, 2** (Summons for Directions) - - - - **266**
See PRACTICE. 5.
—— **Order XXXVI., rr. 14, 18, 18a** (Trial) **266**
See PRACTICE. 5.
—— **Order XLVIII. a, rr. 5, 8, 11** (Actions by and against Firms) - - - **56a**
See BANKRUPTCY. 1.
—— **Order LVII., rr. 1, 2** (Interpleader) - **546**
See PRACTICE. 4.
—— **Order LVIII., r. 15** (Appeals to the Court of Appeal) - - - - **593**
See PRACTICE. 8.
—— **Order LIX., r. 8** (Divisional Courts) - **501**
See COUNTY COURT. 1.
—— **Order LXVII., r. 4** (Service of Orders, &c.)
See PRACTICE. 7. **557**

SALE—Food and drugs—Liability of innocent vendor for milk adulterated in transit
See ADULTERATION. **20**
—— Stamp duty—Assignment of leaseholds—Consideration—Rent - - **335**
See REVENUE. 5.

SALE OF GOODS—*Contract—Shipment to be made by Sailing Ship between specified Dates—Condition Precedent—Implied Condition—Measure of Damages.*

By agreement in writing the defendants sold to the plaintiffs 250 bales of Manila hemp, shipment to be made from a port or ports in the Philippine Islands by sailer or sailers between May 1 and July 31, 1898; the agreement contained a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. In consequence of the Spanish-American war it was in a business sense impossible for the defendants to ship hemp by sailer between the specified dates, but in September they shipped hemp (which would otherwise have satisfied the contract) by steamer, and on October 27 declared it against the con-

SALE OF GOODS—*continued.*
tract; the plaintiffs refused to accept this declaration, and returned it to the defendants, who, on November 4, wrote that it was the only declaration that they were in a position to make:—

Held, that the stipulations as to shipment by sailer or sailers between the specified dates were conditions precedent and the declaration was bad; that it was not an implied condition of the contract that it should be possible to ship by sailer between those dates; that the defendants were not protected by the express condition as to non-arrival of the goods, the non-arrival not having been occasioned by any unavoidable cause within the meaning of the contract; and that the damages were to be ascertained by reference to the market price on November 4, the day on which the defendants finally notified their inability to make a declaration in accordance with the contract. ASHMORE & SON *v.* C. S. COX & CO. **Lord Russell of Killowen C.J. 436**

2. —— *Document of Title, Possession of—Consent of Seller—Draft, Failure to accept—Transfer of Bill of Lading to Sub-vendee—Stoppage in Transitu—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 2; *s.* 47—*Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1; *ss.* 9, 10.

In fulfilment of a contract for the sale of a certain quantity of copper the sellers forwarded to the buyer a bill of lading indorsed in blank for copper shipped on the defendant's ship, together with a draft for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the draft, and delivered the bill of lading to the plaintiffs in fulfilment of a contract which he had, previously to obtaining possession of the bill of lading, made for the sale to them of copper, and they thereupon paid him the price of the copper. The plaintiffs took the bill of lading in good faith, and without notice of the rights of the original sellers in respect of the copper. The sellers stopped the copper in transitu. In an action by the plaintiffs against the defendants for non-delivery of the copper:—

Held, reversing the judgment of Mathew J., that, the buyer having obtained possession of the bill of lading with the consent of the sellers, the transfer of it by him to the plaintiffs gave them a good title to the copper under s. 25, sub-s. 2, of the Sale of Goods Act, 1893, and that the sellers had no right to stop it in transitu. CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY - - - **C. A. 643**

3. —— *Oral Contract—Part Payment—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-s.* 1.

Where, upon an oral contract for the supply of goods, it was a term of the contract that a sum of money which had been overpaid to the vendor upon a previous sale of goods by him to the purchaser should be retained by the vendor on account of the price of the goods contracted to be supplied:—

Held, that there was not a part payment which would satisfy the provisions of s. 4, sub-s. 1, of the Sale of Goods Act, 1893.

Walker v. *Nussey*, (1847) 16 M. & W. 302, followed. NORTON *v.* DAVISON - **C. A. 401**

SALE OF GOODS—*continued.*
—— Costs of reasonable defence by purchaser of action against him by sub-vendee **413**
See DAMAGES.

—— Streets—Offences—Exposing goods for sale on carriage-way—Penalty - **1**
See LONDON. 5.

SALMON FISHERY ACTS—Recovery of penalties—Limitation of time - - **4**
See FISHERY. 1.

SCAFFOLDING—Buildings—Workmen's Compensation Act, 1897 - **1009, 1018**
See EMPLOYER AND WORKMAN. 9, 13.

SCIENTIFIC SOCIETY—Exemption from duty—Property legally appropriated for the promotion of science - - **871**
See REVENUE. 2.

SCOTTISH LAW—False pretences made in Scotland—Goods obtained in England—Debtors Act—Jurisdiction - **230**
See CRIMINAL LAW. 4.

SEA FISHERY—Conditions as to expenditure—Power of one of several councils to impose - - - - **201**
See FISHERY. 2.

SEAMEN—Agreement for service—Advance note—Payment conditional on going to sea—Engagement abroad - - **727**
See SHIP. 4.

—— Engaging seamen for foreign ship—Fine—Civil debt - - - - **964**
See SHIP. 3.

—— Termination of service abroad—"Passage home" - - - - **38**
See SHIP. 5.

—— Wages—Advances—Assignment - **735**
See SHIP. 6.

SECURITY FOR COSTS—Appeal under Workmen's Compensation Act, 1897 - **593**
See PRACTICE. 8.

SERVANT—Misconduct of—Forgetfulness—Contract—Dismissal - - **901**
See MASTER AND SERVANT.

—— Workmen's compensation - - **493**
See Cases under EMPLOYER AND WORKMAN.

SERVICE—Receiver—Notice of application—Defendant not appearing - - **557**
See PRACTICE. 7.

—— Seaman—Termination of service abroad—"Passage home" - - - **38**
See SHIP. 5.

—— Seamen—Wages—Advances - **727, 735**
See SHIP. 4, 6.

SEWER—Drainage of group of houses by combined operation—Subsequent deviation—Nuisance - - - **972**
See LONDON. 2.

—— Vesting in local authority—Sewer made by landowner "for his own profit" - **979**
See LOCAL GOVERNMENT. 4.

SHERIFF—Execution—Seizure of goods and possession for twenty-one days—Sheriff's fees - - - - - 626
See BANKRUPTCY. 2.

—— Receiving order — Execution — Sale — Poundage - - - - 460
See BANKRUPTCY. 8.

SHIP—*Bill of Lading—Exemption of Shipowner from Liability—"Defects latent on beginning Voyage or otherwise."*

A bill of lading contained, among other exceptions, one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise" in hull, tackle, boilers, or machinery, or their appurtenances:—

Held, affirming the judgment of Bigham J., that the exception did not cover a defect which was obvious at the commencement of the voyage. OWNERS OF CARGO ON BOARD SS. WAIKATO *v.* NEW ZEALAND SHIPPING COMPANY - **C. A. 56**

2. —— *Charterparty—Advance Freight.*

By a contract of charterparty the defendants contracted to load on board the plaintiffs' ship a full and complete cargo at a certain rate of freight per ton "on the quantity to be delivered to the consignees." "The freight to be due and paid as follows: Two-thirds in cash three days after sailing ship lost or not lost, the balance on unloading and right delivery of the cargo." After the defendants had loaded a part of the cargo a fire broke out on board and destroyed the goods so loaded. Fire was one of the perils mutually excepted by the charterparty. The defendants subsequently loaded the balance of the cargo, and the ship sailed. Three days after sailing the plaintiffs claimed payment of advance freight on two-thirds of the full cargo shipped:—

Held, that the plaintiffs were not entitled to payment of advance freight on the part of the cargo destroyed. WEIR & CO. *v.* GIRVIN & CO.
Lord Russell of Killowen C.J. 193

3. —— *Engaging Seamen for Foreign Ship—Fine—Civil Debt—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 111.

The prohibition contained in s. 111 of the Merchant Shipping Act, 1894, against unauthorized persons engaging seamen to be entered on board any ship in the United Kingdom, applies where the ship for which the seamen are engaged is a foreign ship.

The fine imposed by that section for its contravention is a punishment for an offence, and is not recoverable as a civil debt. THE QUEEN *v.* STEWART - - - - **Div. Ct. 964**

4. —— *Seamen—Agreement for Service—Advance Note—Payment conditional on going to Sea—Amount exceeding one Month's Wages—Engagement Abroad—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 124, 140.

By the Merchant Shipping Act, 1894, s. 140, sub-s. 1, agreements with the crew which are required to be made in a form approved by the Board of Trade may contain stipulations for payment to seamen, conditionally on their going to sea, of not more than one month's wages.

By sub-s. 2, save as aforesaid, an agreement for payment to a seaman "conditionally on his going to sea from any port in the United Kingdom," is void, and money paid under it shall not be deducted from wages.

By s. 124, where a seaman is engaged at a foreign port, in which there is a British consular officer, the provisions of the Act respecting agreements made in the United Kingdom shall apply, subject to certain modifications.

A seaman was engaged at a foreign port, in which there was a British consul, and was paid a sum exceeding one month's wages, under an advance note, conditionally on his going to sea. In proceedings to recover wages the master claimed to deduct the whole amount paid under the advance note.

On a case stated by justices:—

Held, that s. 124 does not extend s. 140 to engagements of seamen abroad, and therefore s. 140 applies only to engagements to sail from the United Kingdom, and the master was entitled to deduct the whole amount. RITCHIE *v.* LARSEN
Div. Ct. 727

5. —— *Seaman — Termination of Service Abroad—"Passage Home"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 186.

When the service of a seaman belonging to a British ship terminates at a foreign port, and the master elects to "provide him with a passage home," under s. 186, sub-s. 2 (*c*), of the Merchant Shipping Act, 1894, the master is bound to provide him with a passage to the port in the United Kingdom at which he was shipped.

Edwards v. *Steel*, [1897] 1 Q. B. 712; [1897] 2 Q. B. 327, considered. PURVES *v.* STRAITS OF DOVER STEAMSHIP COMPANY - **Mathew J. 38**

6. —— *Seamen—Wages—Advances—Assignment—8 Geo. 1, c. 24, s. 7—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 163.

By 8 Geo. 1, c. 24, s. 7, no master or owner of any merchant ship or vessel shall pay or advance to any seaman, during the time he shall be in parts beyond the seas, any money on account of wages exceeding one moiety of the wages which shall be due at the time of such payment, until such ship or vessel shall return to Great Britain or Ireland, or to some of His Majesty's dominions whereto they belong, under a penalty of double the money so paid or advanced to be recovered in the Admiralty Court by any person who shall first discover and inform of the same:—

Held, that this enactment did not apply to the terms upon which a seaman was engaged where his engagement took place in a foreign port, nor prevent a master from engaging a seaman in a foreign port on the terms that he should be paid a sum down on joining the ship and the remainder of his wages at the end of the voyage:

Also, that if the enactment did apply, the seaman could not recover again as unpaid wages the sum advanced to him in excess of the moiety allowed by the statute.

Sect. 163 of the Merchant Shipping Act, 1894, enacts that, as respects wages due or accruing to a seaman, an assignment or sale thereof made prior to the accruing thereof shall not bind the person making the same; a power of attorney or authority for the receipt thereof shall not be irrevocable; and a payment of wages to the sea-

SHIP—*continued.*
man shall be valid in law, notwithstanding any previous sale or assignment of those wages.

Upon engaging a seaman in a foreign port the master agreed to advance to him a sum on account of wages; the seaman signed a document giving a third person authority to receive that sum, and the master paid it to the third person with the authority of the seaman to make such payment:—

Held, that s. 163 did not apply to make this transaction void, and that the seaman was not entitled to recover from the master the sum so advanced and paid. ROWLANDS *v.* MILLER **Div. Ct. 735**

—— Charterparty—Breach of duty—Liability of charterer for defective condition of ship *See* NEGLIGENCE. **986**

—— Marine insurance - - **179, 579**
See INSURANCE, MARINE. 1, 2.

—— Shipment to be made between specified dates—Condition precedent—Measure of damages - - - - **436**
See SALE OF GOODS. 1.

—— Unloading in dock—Personal injury by accident—Compensation - - **15**
See EMPLOYER AND WORKMAN. 2.

SLANDER OF GOODS—Libel—Comparison of plaintiff's goods with those of defendant—Cause of action - - - **83**
See DEFAMATION. 1.

SOLICITOR—*Costs—Charging Order on Dividend—Property Recovered—Bankruptcy of Judgment Debtor.*

Where a solicitor employed to prosecute an action for the recovery of a debt obtains judgment on behalf of his client, and the judgment debtor becomes bankrupt, the Bankruptcy Court has no jurisdiction to order the trustee of the bankrupt's estate to pay to the solicitor, on account of his costs incurred in recovering the judgment, the amount payable to the judgment creditor by way of dividend. *In re* COOK. *Ex parte* CRIPPS - - - **Div. Ct. 863**

—— Undischarged bankrupt—After-acquired property—Solicitor's bill of costs—Assignee for value—Notice by trustee Priority - - - - **688**
See BANKRUPTCY. 10.

STAMP—Agreement for hire of chattel in consideration of yearly payment - **250**
See REVENUE. 3.

—— Mortgage—Trust deed for securing debenture stock—Transfer of mortgage **121**
See REVENUE. 4.

—— Public revenue - **121, 250, 335, 345, 353, 361**
See REVENUE.

STATUTES:—

13 Eliz. c. 5—*Fraudulent Conveyances* - **612**
See BANKRUPTCY. 3.

43 Eliz. c. 2, s. 6—*Poor Relief* - - **305**
See POOR LAW.

21 Jac. 1, c. 16, s. 3—*Limitations* - **885**
See LIMITATIONS, STATUTE OF. 2.

29 Car. 2, c. 3, s. 17—*Frauds* - - **401**
See SALE OF GOODS. 3.

STATUTES—*continued.*

8 Geo. 1, c. 24, s. 7—*Merchant Shipping* **735**
See SHIP. 6.

11 Geo. 2, c. 19, s. 10—*Distress for Rent* **470**
See LANDLORD AND TENANT. 3.

5 Geo. 4, c. 83, s. 4—*Vagrancy* - - **846**
See CRIMINAL LAW. 6.

3 & 4 Will. 4, c. 27, ss. 2, 7—*Real Property Limitation* - - - - **994**
See LIMITATIONS, STATUTE OF. 3.

5 & 6 Will. 4, c. 50, s. 33—*Highways* - **1026**
See HIGHWAY.

6 & 7 Will. 4, c. 96, s. 1—*Parochial Assessment* - - - - - **667**
See POOR-RATE. 2.

2 & 3 Vict. c. 47, s. 60—*Metropolitan Police* **1**
See LONDON. 5.

3 & 4 Vict. c. 88, s. 2—*County Police* - **59**
See LICENSING ACTS. 3.

8 & 9 Vict. c. 18, s. 35—*Lands Clauses* - **921**
See RAILWAY. 3.

8 & 9 Vict. c. 20, s. 48—*Railways Clauses* **72**
See RAILWAY. 2.

—— —— s. 78 - - - - **921**
See RAILWAY. 3.

8 & 9 Vict. c. 109, s. 18—*Gaming* - **794**
See STOCK EXCHANGE.

10 & 11 Vict. c. 17, s. 72—*Waterworks Clauses*
See WATERWORKS. **958**

11 & 12 Vict. c. 43, s. 11—*Summary Jurisdiction* - - - - - **4**
See FISHERY. 1.

11 & 12 Vict. c. 78, s. 2—*Criminal Law* **490**
See CRIMINAL LAW. 1.

16 & 17 Vict. c. 119, ss. 1, 3—*Betting* - **892**
See GAMING.

18 & 19 Vict. c. 120, ss. 105, 250—*Metropolis Management* - - - **681**
See LONDON. 4.

—— —— ss. 105, 250 - - - **474**
See LANDLORD AND TENANT. 5.

—— —— s. 250 - - - - **972**
See LONDON. 2.

20 & 21 Vict. c. 77, s. 63—*Probate* - **746**
See ESTOPPEL.

21 & 22 Vict. c. 90, s. 40—*Medical Practitioners*
See MEDICAL PRACTITIONER. **635**

25 & 26 Vict. c. 61, s. 35—*Highways* - **1026**
See HIGHWAY.

25 & 26 Vict. c. 102, ss. 77, 96—*Metropolis Management* - - - **474**
See LANDLORD AND TENANT. 5.

—— —— ss. 77, 112 - - - **681**
See LONDON. 4.

31 & 32 Vict. c. 5, s. 1—*Metropolitan Streets* **1**
See LONDON. 5.

32 & 33 Vict. c. 62, s. 11, sub-s. 13; s. 13, sub-s. 1—*Debtors* - - - **230**
See CRIMINAL LAW. 4.

33 & 34 Vict. c. 90, s. 11—*Foreign Enlistment*
See FALSE REPRESENTATION. **816**

35 & 36 Vict. c. 94, s. 3—*Licensing* - **7**
See LICENSING ACTS. 2.

STATUTES—*continued.*

36 & 37 Vict. c. 66, s. 47—*Judicature* - 273
See PRACTICE. 2.

36 & 37 Vict. c. 71, s. 62—*Salmon Fishery* 4
See FISHERY. 1.

37 & 38 Vict. c. 57, s. 8—*Real Property Limitation* - - - - - 885
See LIMITATIONS, STATUTE OF. 2.

38 & 39 Vict. c. 55, s. 13, sub-s. 1—*Public Health* - - - - 979
See LOCAL GOVERNMENT. 4.

—— —— ss. 36, 305 - - - 751
See JUSTICES.

—— —— s. 62 - - - - 377
See LOCAL GOVERNMENT. 7.

—— —— s. 211, sub-s. 1 (*b*) - - 273
See PRACTICE. 2.

38 & 39 Vict. c. 60, s. 15, sub-s. 3—*Friendly Societies* - - - - 45
See FRIENDLY SOCIETY.

38 & 39 Vict. c. 63, s. 6—*Sale of Food and Drugs* - - - - 20
See ADULTERATION.

39 & 40 Vict. c. 75, ss. 2, 17, 20—*Rivers Pollution Prevention* - - - 27
See RIVER.

39 & 40 Vict. c. 79, s. 47—*Elementary Education* - - - - - 1000
See EDUCATION ACTS.

40 & 41 Vict. c. XXX., s. 25—*Middlesborough Improvement* - - - 425
See MUNICIPAL CORPORATION. 1.

41 & 42 Vict. c. 15, s. 12—*Customs and Inland Revenue* - - - - 865
See REVENUE. 1.

41 & 42 Vict. c. 25, s. 3—*Public Health—Water* - - - - 377
See LOCAL GOVERNMENT. 7.

41 & 42 Vict. c. 26, s. 28, sub-s. 2—*Parliamentary and Municipal Registration* - 102
See PARLIAMENT. 2.

—— —— s. 28, sub-s. 13 - - - 95
See PARLIAMENT. 1.

—— —— s. 28, sub-s. 14 - - - 109
See PARLIAMENT. 4.

42 & 43 Vict. c. 30, s. 3—*Sale of Food and Drugs* - - - - 20
See ADULTERATION.

42 & 43 Vict. c. 49, ss. 6, 35—*Summary Jurisdiction* - - - - 273
See PRACTICE. 2.

—— —— —— - - - - 305
See POOR LAW.

45 & 46 Vict. c. 50, s. 36, sub-ss. 1, 2; s. 60, sub-s. 3—*Municipal Corporations* 386
See MUNICIPAL CORPORATION. 3.

—— —— ss. 77, 88 - - - 852
See MUNICIPAL CORPORATION. 2.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*b*); ss. 43, 44—*Bankruptcy* - - - 612
See BANKRUPTCY. 3.

—— —— ss. 45, 125 - - - 699
See BANKRUPTCY. 5.

STATUTES—*continued.*

46 & 47 Vict. c. 52, s. 49—*Bankruptcy* - 710
See BANKRUPTCY. 4.

—— —— s. 125, sub-ss. 4, 5, 9 - - 905
See BANKRUPTCY. 9.

46 & 47 Vict. c. 57, ss. 11, 95—*Patents, Designs, and Trade Marks* - - - 909
See PATENT. 2.

—— —— s. 101 - - - - 406
See PATENT. 1.

46 & 47 Vict. c. 61, ss. 6–9, 22—*Agricultural Holdings* - - - - 559
See LANDLORD AND TENANT. 2.

—— —— s. 57 - - - - 465
See LANDLORD AND TENANT. 1.

48 & 49 Vict. c. 15, s. 18—*Registration of Voters* - - - - 102
See PARLIAMENT. 2.

48 & 49 Vict. c. 51, s. 11, sub-s. 3—*Customs and Inland Revenue* - - - 871
See REVENUE. 2.

49 & 50 Vict. c. 48, s. 6—*Medical Practitioners* 635
See MEDICAL PRACTITIONER.

50 & 51 Vict. c. 55—*Sheriffs* - - 460
See BANKRUPTCY. 8.

51 & 52 Vict. c. 41, s. 33—*Local Government* 759
See LOCAL GOVERNMENT. 3.

—— —— s. 62 - - - - 515
See LOCAL GOVERNMENT. 5.

51 & 52 Vict. c. 43, s. 65—*County Courts* 507
See COUNTY COURT. 3.

—— —— ss. 88, 89, 113, 114 - - 430
See COUNTY COURT. 2.

—— —— s. 120 - - - - 501
See COUNTY COURT. 1.

51 & 52 Vict. c. 50, ss. 1, 27—*Patents, Designs, and Trade Marks* - - - 406
See PATENT. 1.

—— —— s. 4 - - - - 909
See PATENT. 2.

51 & 52 Vict. c. 54, s. 6, sub-s. 1—*Sea Fisheries* 201
See FISHERY. 2.

52 & 53 Vict. c. 21, s. 21—*Weights and Measures* 449
See WEIGHTS AND MEASURES.

52 & 53 Vict. c. 45, s. 2, sub-s. 1; ss. 9, 10—*Factors* - - - - 643
See SALE OF GOODS.

52 & 53 Vict. c. 49, s. 12—*Arbitration* - 559
See LANDLORD AND TENANT. 2.

53 & 54 Vict. c. 5—*Lunacy* - - 455
See DEFAMATION. 2.

53 & 54 Vict. c. 39, ss. 2, 3—*Partnership* 810
See BANKRUPTCY. 7.

53 & 54 Vict. c. 71, ss. 1, 11—*Bankruptcy* 623
See BANKRUPTCY 2.

—— —— s. 11, sub-s. 1 - - - 460
See BANKRUPTCY. 8.

54 & 55 Vict. c. 39, s. 57, Sched. I.—*Stamps* 335
See REVENUE. 5.

—— —— s. 86, sub-s. 1; s. 87, sub-s. 3; s. 88, sub-s. 1; Sched. I. - - - 121
See REVENUE. 4.

—— —— s. 86, Sched. I. - - - 361
See REVENUE. 7.

STATUTES—*continued.*

54 & 55 Vict. c. 39, s. 98, Sched. I.—*Stamps*
See REVENUE. 8. 353
—— —— Sched. I. - - - 345
See REVENUE. 6.
—— —— - - - - - 250
See REVENUE. 3.
54 & 55 Vict. c. 76, s. 4—*Public Health—London* - - - - - 693
See PUBLIC AUTHORITIES.
56 & 57 Vict. c. 61, s. 1—*Public Authorities Protection* - - - - 693
See PUBLIC AUTHORITIES.
56 & 57 Vict. c. 71, s. 4, sub-s. 1—*Sale of Goods*
See SALE OF GOODS. 401
—— —— s. 25, sub-s. 2; s. 47 - - 643
See SALE OF GOODS.
56 & 57 Vict. c. 73, s. 5, sub-s. 1—*Local Government* - - - - 396
See LOCAL GOVERNMENT. 1.
—— —— ss. 25, 29 - - - 1026
See HIGHWAY.
—— —— s. 68 - - - - - 540
See LOCAL GOVERNMENT. 6.
57 & 58 Vict. c. 16, s. 1, sub-s. 4—*Supreme Court of Judicature—Procedure* - 54
See PRACTICE. 3.
57 & 58 Vict. c. 41, s. 1—*Prevention of Cruelty to Children* - - - - 283
See CRIMINAL LAW. 5.
57 & 58 Vict. c. 60, s. 111—*Merchant Shipping*
See SHIP. 3. 964
—— —— ss. 124, 140 - - - 727
See SHIP. 4.
—— —— s. 163 - - - - 735
See SHIP. 6.
—— —— s. 186 - - - - - 38
See SHIP. 5.
57 & 58 Vict. c. ccxiii., s. 8—*London Building*
See LONDON. 3. 496
—— —— ss. 106, 107 - - - 720
See LONDON. 1.
58 & 59 Vict. c. 37, ss. 4, 23—*Factories and Workshops* - - - - 773
See EMPLOYER AND WORKMAN. 7.
59 & 60 Vict. c. 16, ss. 1, 2, 3, 9—*Agricultural Rates* - - - - 759
See LOCAL GOVERNMENT. 3.
60 & 61 Vict. c. 37—*Workmen's Compensation*
See REVENUE. 8. 353
—— —— - - - - - 593
See PRACTICE. 8.
—— —— s. 1 - - - 141, 261
See EMPLOYER AND WORKMAN. 1, 8.
—— —— s. 1, sub-s. 1 - - - 1015
See EMPLOYER AND WORKMAN. 4.
—— —— s. 1, sub-s. 3 - - - 805
See EMPLOYER AND WORKMAN. 11.
—— —— s. 1; s. 7, sub-s. 1 - - 70
See EMPLOYER AND WORKMAN. 1.
—— —— s. 1; s. 7, sub-ss. 1, 2 - - 15
See EMPLOYER AND WORKMAN. 2.
—— —— s. 7 - - - - 773
See EMPLOYER AND WORKMAN. 7.

STATUTES—*continued.*

60 & 61 Vict. c. 37, s. 7, sub-s. 1—*Workmen's Compensation* **157, 374, 1003, 1009, 1018**
See EMPLOYER AND WORKMAN. 6, 9, 12, 13.
—— —— s. 7, sub-s. 2 - - - 1005
See EMPLOYER AND WORKMAN. 10.
—— —— Sched. I., 1 (*b*) - - - 493
See EMPLOYER AND WORKMAN. 5.
61 & 62 Vict. c. 36, s. 1—*Criminal Evidence*
See CRIMINAL LAW. 3. 77
—— —— ss. 2, 3 - - - - 150
See CRIMINAL LAW. 2.
61 & 62 Vict. c. 49, s. 2—*Vaccination* - 577
See VACCINATION.

STOCK EXCHANGE—*Contract*—"*Differences*"—"*Cover*" *System*—*Delivery*—*Acceptance*—"*If Demanded*"—*Option*—*Gambling Transaction*—"*Gaming or Wagering*"—*Nullity*—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

A contract on the "cover" system between two stock and share dealers for "differences" is a contract "by way of gaming or wagering" and therefore void under s. 18 of the Gaming Act, 1845: and it is none the less so where the contract gives the buyer or seller an option to demand delivery or acceptance (as the case may be) of the stocks or shares the subject-matter of the contract.

Universal Stock Exchange v. *Strachan*, [1896] A. C. 166, considered. *In re* GIEVE **C. A. 794**

STOPPAGE IN TRANSITU—Possession of document of title—Consent of seller—Transfer of bill of lading to sub-vendee **643**
See SALE OF GOODS. 2.

STREAM—Pollution—Remedies—Nuisance **27**
See RIVER.

STREET—Expenses of paving new street—Covenant to bear charges—Payment by landlord—Right to recover from tenant **474**
See LANDLORD AND TENANT. 5.
—— New street—Commencing to form street—London Buildings Acts - - **496**
See LONDON. 3.
—— "New street"—Paving expenses - **631**
See LONDON. 4.
—— Offences—Exposing goods for sale on carriageway—Penalty - - **1**
See LONDON. 5.

SUB-LEASE—Rent—Payment by lessee—Indemnity—Liability of sub-lessee **161**
See LANDLORD AND TENANT. 6.

SUB-LETTING—Breach of covenant—Right of re-entry — Forgetfulness — Equitable relief against forfeiture - - **835**
See LANDLORD AND TENANT. 4.

SUMMARY JURISDICTION—Appeal—Criminal cause or matter—Application to enforce general district rate - - **273**
See PRACTICE. 2.
—— Salmon Fishery Acts—Recovery of penalties—Limitation of time - - **4**
See FISHERY. 1.

SUMMARY JURISDICTION—*continued.*
—— Sum due under maintenance order—Recoverable as a civil debt - - 305
See POOR LAW.

SUMMING-UP—Criminal Evidence Act, 1898—Right of counsel for prosecution to sum up where prisoner gives evidence 150
See CRIMINAL LAW. 2.

SUMMONS—For directions — Notice of trial—Assizes—Jurisdiction - - 266
See PRACTICE. 5.

SURETY—Co-sureties—Giving time to debtor—Contribution - - - 312
See PRINCIPAL AND SURETY.

TAXES.
See Cases under REVENUE.

TENANCY AT WILL — Determination — Mortgage—Creation of fresh tenancy 994
See LIMITATIONS, STATUTE OF. 3.

—— Doing of repairs by landlord—Determination of will - - - - 486
See LIMITATIONS, STATUTE OF. 4.

TENANT—Copyholds—Repairs—Breach of obligation by tenant — Remedy of lord against tenant's executors - 293
See COPYHOLD.

—— Landlord and.
See Cases under LANDLORD AND TENANT.

THEFT—Loss by—Burglary and housebreaking—Entry by opening unlocked shop door —"Actual forcible and violent entry" 595
See INSURANCE.

TIME—Co-sureties — Giving time to debtor — Contribution - - - 312
See PRINCIPAL AND SURETY.

TRADER—Disparagement of goods—Comparison of plaintiff's goods with those of defendant—Cause of action - - 86
See DEFAMATION. 1.

TRANSFER — Bill of lading to sub-vendee — Possession of document of title—Consent of seller—Stoppage in transitu - 643
See SALE OF GOODS. 2.

—— Mortgage—Stamp—Trust deed for securing debenture stock - - - 121
See REVENUE. 4.

—— Outlying district of county—Transfer to other county—Justices—Jurisdiction 59
See LICENSING ACTS. 3.

—— Part of one county to another county—Adjustment of liabilities - - 515
See LOCAL GOVERNMENT. 5.

—— Part of one union to another union—Adjustment of property and liabilities - 540
See LOCAL GOVERNMENT. 6.

—— Stamp duty—Assignment of leaseholds—Consideration—Rent - - 335
See REVENUE. 5.

TRIAL—New trial — Workmen's Compensation Act—Jurisdiction of county court judge 805
See EMPLOYER AND WORKMAN. 11.

TRIAL—*continued.*
—— Notice of—Assizes—Summons for directions—Jurisdiction - - - 266
See PRACTICE. 5.

ULTRA VIRES — Money paid ultra vires by directors to shareholders — Right of directors to indemnity from shareholders 480
See COMPANY. 1.

UNDERWRITER — Liability for consequential damage — Cost of disposing of cargo rendered worthless by sea peril - 579
See INSURANCE, MARINE. 1.

UNDISCHARGED BANKRUPT—After-acquired property — Solicitor's bill of costs — Assignee for value—Notice by trustee—Priority - - - - 688
See BANKRUPTCY. 10.

UNION—Transfer of part of one union to another union — Adjustment of property and liabilities - - - - 540
See LOCAL GOVERNMENT. 6.

VACCINATION — *Conscientious Objection — Requirement of Production of Birth Certificate—Vaccination Act*, 1898 (61 & 62 *Vict. c.* 49), *s.* 2.

Upon an application by the parent of an unvaccinated child, whose birth has been registered, for a certificate of conscientious objection under s. 2 of the Vaccination Act, 1898, the justices are entitled to refuse to give such certificate unless and until the applicant produces to them a certificate of the registration of the child's birth. THE QUEEN *v.* LOWNDES Div. Ct. 577

VAGRANCY—Pretending to tell fortunes—Intent to deceive—Rogue and vagabond 846
See CRIMINAL LAW. 6.

VENDOR AND PURCHASER—Deposit—Action to recover—Contract for sale of lease—Act of bankruptcy by vendor before completion - - - - 710
See BANKRUPTCY. 4.

VOTERS—Registration.
See Cases under PARLIAMENT.

WAGES—Seamen—Advances - 727, 735
See SHIP. 4, 6.

WARRANT — Poor-rate — Distress warrant — Appeal - - - - 532
See POOR-RATE. 1.

WASTE—"Person supplied with water"—Suffering waste—Owner of house not exceeding 10*l.* rent - - - 958
See WATERWORKS.

WATER — Artificial reservoir—"Land covered with water"—Proportionate rating 273
See PRACTICE. 2.

—— Suffering waste - - - - 958
See WATERWORKS.

—— Supply of water to house—Owner—Expenses
See LOCAL GOVERNMENT. 7. 377

WATER-CLOSETS—Jurisdiction—Order for entry on premises—Local authority - 751
See JUSTICES.

WATERWORKS—"*Person supplied with Water*"—*Suffering Waste*—*Owner of House not exceeding* 10*l. Rent*—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 72.

By the provisions of a water company's special Act, if "any person supplied with water" by the company negligently suffered the water so supplied to him to be wasted he was liable to a penalty:—

Held, that where a house was let to a tenant at a rent not exceeding 10*l.*, so that the owner was liable under s. 72 of the Waterworks Clauses Act, 1847, to pay the water rates instead of the occupier, the owner was a "person supplied with water" within the meaning of the special Act, and was under a duty to take care that the water supplied was not wasted. BROCK *v.* HARRISON Div. Ct. 958

WEIGHTS AND MEASURES—*Coal*—*Ticket in Form in Schedule*—*Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.

By s. 21 of the Weights and Measures Act, 1889, where coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller is therewith to deliver, or cause to be delivered, or sent by post or otherwise, to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note according to the form in the 3rd schedule to the Act.

By an agreement between a firm of coal merchants and the committee of an asylum all coal supplied to the asylum was to be weighed on the asylum weighbridge, and the weight there ascertained before delivery was accepted by the committee. At the time of weighing a cartload of coal in course of delivery at the asylum, the carter had in his possession a book of forms containing tickets in the form in the schedule, but in which the weights which were required to be entered were left in blank; at the conclusion of the weighing, and before any part of the coal was unloaded, the purchasers' storekeeper, in pursuance of the arrangement between the parties, filled in upon the ticket the weight of the coal and vehicle, the tare weight of the vehicle and the net weight of coal delivered; the ticket was then detached from the book, and handed by the carter to the storekeeper, and the coal was unloaded:—

Held, that the provisions of s. 21 had been complied with by the sellers, and that they could not be convicted under that section for not delivering to the purchaser before any part of the coal was unloaded a ticket in the form in the 3rd schedule to the Act. EDWARDS *v.* PURNELL Div. Ct. 449

WILL—Validity—Probate action—Citation of parties—Res judicata - - 746
See ESTOPPEL.

WINDING-UP OF COMPANY—Costs of official liquidator—Right to appeal—Order to pay costs personally - - 961
See COMPANY. 2.

WORDS—"About" a factory - - 1003
See EMPLOYER AND WORKMAN. 12.

—— "Actual forcible and violent entry" 595
See INSURANCE, BURGLARY.

—— "Approved" plan - - - 444
See LOCAL GOVERNMENT. 2.

—— "Candidate" - - - - 852
See MUNICIPAL CORPORATION. 2.

—— "Cover" - - - - 794
See STOCK EXCHANGE.

—— "Defects latent on beginning voyage or otherwise" - - - - 56
See SHIP. 1.

—— "Dependants" - - - - 1005
See EMPLOYER AND WORKMAN. 10.

—— "Differences" - - - - 794
See STOCK EXCHANGE.

—— "Land covered with water" - - 273
See PRACTICE. 2.

—— "Marketable security" - - 345
See REVENUE. 6.

—— "New street" - - - - 681
See LONDON. 4.

—— "Ordinary luggage" - - - 243
See RAILWAY. 4.

—— "Physician" - - - - 635
See MEDICAL PRACTITIONER.

—— "Place" - - - - - 892
See GAMING.

—— "Place of public resort" - - 425
See MUNICIPAL CORPORATION. 1.

—— "Putrid solid matter" - - - 27
See RIVER.

—— "Repairs" - - - - 1009
See EMPLOYER AND WORKMAN. 9.

—— "Rights acquired" - - - 406
See PATENT. 1.

—— "Scaffolding" - - - - 1009
See EMPLOYER AND WORKMAN. 9.

—— "Wilfully neglect" - - - 283
See CRIMINAL LAW. 5.

WORKMAN—Accident to—Compensation.
See Cases under EMPLOYER AND WORKMAN.

—— Policy of insurance against accident—Stamp duty—Employer's liability 353
See REVENUE. 9.

—— Security for costs—Appeal under Workmen's Compensation Act - - 598
See PRACTICE. 8.

BIBL. LONDIN

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.

UL 21 SEP 1970